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In The Supreme Court of the United States

CITY OF AUSTIN, MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, and DAVID ROBERTSON,

Petitioners,

v.

NORMAN MINETA, Secretary of Transportation, MIKE LEAVITT, Administrator of Environmental Protection Agency, LES BROWNLEE, Acting Secretary of the Army, THE UNITED STATES, and LONGHORN PARTNERS PIPELINE, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under governing regulations for the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA), promulgated by the Council on Environmental Quality (CEQ), the framework of the NEPA process is that a major federal action's potential environmental impact is evaluated initially by an environmental assessment (EA), which results in *either* a finding of no significant impact (FONSI) – at which point the NEPA process stops – *or* a determination that the action may significantly affect the environment, in which case a full environmental study called an environmental impact statement (EIS) is conducted.

1. May federal agencies evade the CEQ regulations, and still comply with NEPA's statutory requirement that, "to the fullest extent possible," they conduct an EIS whenever a major federal action may "significantly affect[] the quality of the human environment," 42 U.S.C. § 4332(C), by the purely bureaucratic device of adding privately-negotiated mitigation measures to a project whose impact otherwise rises to the level of "significance" that would trigger an EIS and, instead, issuing a "mitigated FONSI" based on policy-dictated estimations of acceptable societal risk rather than fact-based determinations about "significance"?

2. In the absence of direction from statute or regulation, what are the legal standards governing agency approval of mitigated FONSIs?

LIST OF PARTIES

Appellants below:

CITY OF AUSTIN

and

MARIAN COLLINS; BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT; DAVID ROBERTSON.

Appellees below:

THOMAS E. WHITE, in his official capacity as Acting Secretary of the Department of Army; NORMAN Y. MINETA, Secretary, Department of Transportation; CHRISTINE T. WHITMAN, Administrator, United States Environmental Protection Agency; UNITED STATES OF AMERICA,

and

LONGHORN PARTNERS PIPELINE, L.P.

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PETITION FOR WRIT OF CERTIORARI

The City of Austin (City), Marian Collins, the Barton Springs-Edwards Aquifer Conservation District, and David Robertson (collectively, the Collins petitioners) petition the Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published as *Spiller v. White*, 352 F.3d 235 (5th Cir. 2003), and reprinted at App. 1a-19a. The unpublished court of appeals order denying the petition for rehearing is at App. 97a-98a. The final order of the United States District Court for the Western District of Texas is not reported in the official reporters; it is reprinted at App. 20a-66a. The final decision of the joint lead federal agencies – the United States Environmental Protection Agency (EPA) and the United States Department of Transportation (DOT) – is not officially reported; it is reprinted at App. 67a-96a.

JURISDICTION

The court of appeals opinion and judgment issued on December 12, 2003. App. 1a-21a. The court of appeals denied the City and Collins petitioners' joint motion for rehearing on January 12, 2004. App. 97a-98a. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

In pertinent part, 5 U.S.C. § 706(2) provides:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> . . . .
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

In pertinent part, 42 U.S.C. § 4332(C)(2) provides:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall
>
> . . . .
>
> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

STATEMENT OF THE CASE

In 1997, Longhorn Partners Pipeline, L.P., a private, limited liability company, purchased an already half-century old, 450-mile mothballed pipeline that had experienced frequent spills and leaks – 173 according to the district court. App. 22a, 69a, 76a. Longhorn linked the old line with a new 250-mile segment and planned to convert it from shipping crude oil east to shipping gasoline, jet fuel, and other petroleum products from Texas Gulf Coast refineries west to El Paso, at the western edge of Texas.[1]

The resulting pipeline – the Longhorn Pipeline – runs more than 700 miles across Texas, slicing through densely populated Austin neighborhoods and across vast, pristine ground and surface water sources that provide drinking

[1] More than half of the old segment of the Longhorn line is pre-1970 electronic resistance welded pipe, an inferior type of pipe that is the subject of government advisories warning of its higher susceptibility to certain failure mechanisms.

water for hundreds of thousands of Texans. Longhorn intends to ship 10 million gallons of pressurized gasoline and jet fuel a day through the old pipe, crossing city parks, residential backyards, rivers and streams, wetlands, recharge zones for sensitive aquifers, and working ranches.

Local governments in Central Texas – the City of Austin, the Barton Springs-Edwards Aquifer Conservation District, and the Lower Colorado River Authority[2] – joined with affected private landowners, including rancher Marian Collins and Law Professor David Robertson, who sued to stop the pipeline's start-up until it had been evaluated under NEPA. The federal district court enjoined Longhorn's operation until either DOT or EPA had completed an environmental impact statement (EIS) under NEPA. App. 139a-140a.[3]

Longhorn promptly sought, but was denied, an emergency stay from the Fifth Circuit. App. 155a. Lengthy negotiations ensued, resulting in a first-phase settlement agreement whereby the government and Longhorn dismissed their appeals, and EPA and DOT were to jointly conduct an EA. App. 156a-184a. The EA, in turn, was to result in either a FONSI or a decision to conduct a more comprehensive EIS. App. 161a.[4] While the parties agreed that a mitigated FONSI was a possibility, any such result

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[2] The Lower Colorado River Authority has resolved its dispute with Longhorn and is no longer in the case.

[3] The district court permitted Longhorn to proceed with construction, but at its own risk.

[4] The settlement agreement also permitted the government to move to the EIS phase at any point during the EA phase. App. 161a.

had to comply with NEPA and CEQ regulations. App. 157a, 161a.

The district court approved the settlement in early March of 1999 in an agreed order that prevented Longhorn's operation until completion of the government environmental studies under the agreement. App. 185a-188a.

EPA and DOT issued a draft EA in the fall of 1999, preliminarily concluding that the pipeline's operation was not likely to pose a significant threat to the environment and recommending a FONSI. Public meetings on the draft EA then were conducted in Houston, Austin, and El Paso, as well as two smaller Texas cities.[5] More than 6,000 written comments were submitted, overwhelmingly opposing the pipeline's operation across its chosen route. App. 73a.

Outside the public forums, the government engaged in private negotiations with Longhorn. As the ink dried on the first-phase settlement agreement, the chief NEPA policy arm for the White House, the Council on Environmental Quality (CEQ), began pressing the lead agencies and Longhorn to reach an accommodation. CEQ's chief day-to-day official on the Longhorn matter worked to have them stop short of recommending a full EIS for the Longhorn line and, instead, issue a mitigated FONSI. Ray Clark Depo., p. 30; p. 150.

EPA and DOT conducted extensive private negotiations with Longhorn to find a balance that let Longhorn

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[5] Over 1,000 people attended the Austin meeting. App. 71a.

have its project along its chosen route while giving the government something – in the form of a list of mitigation measures – to tout as environmental improvement.[6] By the time the NEPA process ended, these negotiations had yielded twenty-one distinct versions of mitigation plans proposed by Longhorn, the most significant of which were negotiated after the close of the public comment period. App. 75a n.4.

Key to the private negotiations between Longhorn and the government was EPA's decision to enter into a consultation agreement with the United States Fish and Wildlife Service under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a), over the pipeline's threat to endangered species in the Austin area, at Barton Springs. With EPA's designation of Longhorn as its federal representative in the process, the endangered species consultation effectively excluded the public, the City of Austin, and the Collins petitioners, leaving only Longhorn and the federal agencies to hammer out the details of acceptable mitigation.

Nonetheless, by the summer of 2000, DOT and EPA[7] reached an impasse on whether to conduct an EIS or, instead, stop at an EA and issue a FONSI. In mid-July, they wrote CEQ, declared the impasse – with EPA favoring an EIS, and DOT opposed – and requested CEQ's

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[6] The agencies repeatedly acceded to Longhorn rejections of agency-proposed mitigation measures based on the government's negotiating position that it could impose only the items that Longhorn agreed to. App. 75a.

[7] EPA was the lead agency charged with "overseeing environmental impact analyses." App. 157a. DOT was charged with "overseeing pipeline safety and technology." *Id.*

assistance in resolving the "novel and difficult issues raised" by the Longhorn Pipeline dispute and the "policy choice" it had placed in the agencies' laps. App. 189a-191a.

CEQ's response to the EPA/DOT impasse letter was to "recommend" issuance of a FONSI by mid-October, 2000. App. 192a-196a. The lead agencies complied, issuing the final EA and FONSI on November 3rd.

The FONSI concluded that, without improvements, the impacts of the pipeline – which could be expected to experience a higher failure rate than an average pipeline, App. 71a – would be significant and an EIS required: "[M]itigation measures are *necessary* to reduce the potential impacts of the proposed project to a level of insignificance." Final EA, ES-22 & 9-1 (emphasis added). The federal agencies concluded, however, that the long-running private negotiations between them and Longhorn, and the twenty-one mitigation plans that had passed back and forth, had yielded a pipeline mitigation plan they could live with: "The mitigation measures Longhorn will implement if a FNSI is issued will minimize the potential risks of its project to an insignificant level." App. 95a.

The agencies' decision to stop at a FONSI rested on highly uncertain estimated probabilities for particular environmental impacts during the pipeline's anticipated 50-year operational life (at the end of which most of it would be more than a century old). App. 84a-92a (details of calculations of "residual risk"). Their estimate was that, during this time span, there is at least a 15.3% probability of stream, wetland, or public drinking water supply

contamination, or death or injury to one or more persons. *Id.*[8] Due to the inadequacy of data necessary to make a reliable statistical prediction of this sort, the agencies hedged their bets by also adding "qualitative" judgment to the mitigated FONSI rationale.[9]

The parties returned to district court as contemplated by the settlement agreement. Acting on cross-motions for summary judgment, the court upheld the FONSI. Detecting a "certain stench to the FONSI" from "White House influence," the court expressed "no doubt the White House's policy goals affected the ultimate decision" to stop at a FONSI. App. 39a. It concluded on this point that "political policy goals" had been inserted into the final FONSI decision, removing the usual cloak of deference. App. 40a.

The district court was "extremely concerned" about the pipeline. App. 63a. Still, it upheld the mitigated FONSI decision, finding that a sufficiently "hard look" had been given and that the deferential "arbitrary and capricious" standard tied its hands.

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[8] The breakdown of the probabilities is: an 8% chance that a recreational stream will be contaminated at least once; a 5% chance that a wetland will be contaminated at least once; a .3% chance that a surface or subsurface public drinking water supply will be contaminated at least once; a .5% chance that one or more deaths will occur from a flash fire; and a 2.3% chance that injury will occur from a flash fire. The FONSI omitted the final EA's calculation of the estimated threat of prime agricultural land contamination. Including that threat raises the statistical probability of a harmful environmental impact to 18.3%.

[9] Final EA, Appendix 9B-1 ("[d]ue to the uncertainties involved in such calculations, they are not the primary basis of the EA findings.")

The Fifth Circuit used the same "arbitrary and capricious" standard to review issuance of a mitigated FONSI that this Court has used to review mitigated EISs in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). App. 8a-9a. Based on this standard, the Fifth Circuit affirmed the district court.

REASONS FOR GRANTING THE WRIT

The questions presented here raise issues important to the administration of the nation's environmental laws, including a conflict between at least the Second Circuit and Fifth Circuit on the question of the standard for approving a mitigated FONSI.

This Court has never addressed the standards for mitigated FONSIs in the NEPA process. The last time the Court addressed the substantive rules of NEPA at all was fifteen years ago. Then, the Court did address mitigation measures, *but in the EIS, not the EA, context*. *See Methow Valley*, 490 U.S. at 351 ("important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences"); and *Marsh*, 490 U.S. at 363 (one issue is whether an EIS "must contain a complete mitigation plan").

Mitigated FONSIs – creatures of bureaucratic invention – are not even mentioned in either the statute or CEQ's NEPA regulations.[10] They are mentioned, however,

[10] CEQ promulgated regulations to guide federal agencies in the administration of NEPA. *See* 40 C.F.R. Part 1500. These regulations are

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in other extant CEQ guidance on NEPA, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations."[11] In its answer to Question No. 40, CEQ rejects the basic concept of mitigated FONSIs – at least insofar as they are used to avoid EISs by adding mitigation measures to bring a project's impacts below the significance threshold:

> If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS.

Forty Most Asked Questions, 46 Fed.Reg. 18,038.[12] As Professor Mandelker points out in his NEPA treatise: "Council on Environmental Quality (CEQ) regulations contemplate mitigation measures in impact statements. They do not cover the role of mitigation when federal

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entitled to substantial deference by the courts. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

[11] 46 Fed.Reg. 18,026 (March 23, 1981). The lower courts have divided over the weight to give this guidance. *Compare Davis v. Mineta*, 302 F.3d 1104, 1125 n.17 (10th Cir. 2002) (*Forty Questions* are "persuasive authority"), *with Deukmejian v. NRC*, 751 F.2d 1287, 1302 n.77 (D.C. Cir. 1984) (*Forty Questions* not persuasive authority, though significant for light cast on CEQ's interpretation of its own regulations).

[12] This situation of using a mitigated FONSI to avoid an EIS must be distinguished from adding mitigation measures to a FONSI that otherwise concluded that the significance threshold would not be crossed by a project. *See Forty Most Asked Questions*, Answer 39, 46 Fed.Reg. 18,037. Such a situation does *not* describe the Longhorn Pipeline project. Even as agencies continue to use mitigated FONSIs to avoid EISs, CEQ does not know how to handle the matter under NEPA. *See, e.g.*, The NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* (Sept. 2003).

agencies decide not to prepare impact statements." Daniel R. Mandelker, NEPA LAW AND LITIGATION, § 8.08[10] (2d ed. 1995)

Yet, federal agency administration of NEPA has evolved dramatically over the years, to the point where this "widely employed backdoor mechanism" threatens to overwhelm the commonly held view that NEPA's procedures result in comprehensive EISs when a project involving major federal action – as the Longhorn Pipeline project concededly does[13] – threatens to significantly affect the quality of the human environment. *See* B. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 908, 919 & nn.73, 74 (2002) (noting that "the number of EISs produced annually has declined steadily over the years despite growth in both the scale and scope of federal activity, while the number of EAs and FONSIs has soared").

This quiet transformation of NEPA has major implications for enforcement of the nation's environmental laws. NEPA is widely regarded as the nation's prime environmental statute, variously described as "the most admired" environmental statute[14] and the "centerpiece of U.S. environmental law."[15] But the only rights this bellwether

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[13] The agencies conceded what was at least implicit in the March 1999 settlement agreement: that the Longhorn Pipeline project triggered "major federal action" within the meaning of NEPA. "DOT is required to approve facilities response plans for such pipelines pursuant to the Oil Pollution Act, a mandatory approval that we agree constitutes an action under NEPA." App. 190a.

[14] M. Blumm, *A Primer on Environmental Law and Some Directions for the Future*, 11 VA. ENVTL. L.J. 381, 382 (1992).

[15] W. Rogers, *The Most Creative Moments in the History of Environmental Law: "The Whats,"* 2000 U. ILL. L. REV. 1, 31 (2000).

environmental law gives those in the shoes of Austin and the Collins petitioners are procedural ones: "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Methow Valley*, 490 U.S. at 350; see also *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (NEPA "simply guarantees a particular procedure, not a particular result").

Since private rights under perhaps the nation's premiere environmental statute are only procedural, a determination of the standards that are to govern a key bureaucratic mechanism in the NEPA machinery is vitally important to administration of the nation's environmental laws. This case provides the Court an appropriate vehicle to provide such crucial guidance. Here, there is a project that concededly implicates major federal action. And the federal agencies agree it would have triggered an EIS but for one factor: the use of a mitigated FONSI dependent on privately-negotiated agreements between the federal government and the very entity whose project is under scrutiny.

I. The extra-legal bureaucratic pressures for mitigated FONSIs have not so overwhelmed NEPA's statutory and regulatory procedures that the policymaking weighing of risks and benefits that is reserved for the end of the EIS process may be substituted for fact-based determinations of "significance" at the EA phase.

The lead agencies were able to lower their estimations of the Longhorn project's impacts to below the "significance" threshold through one key and overriding conclusion: that the pipeline's projected future risks to the public and the environment were not so great as to be deemed NEPA-significant. However, this approach confuses the

policy decision that is to be made after a full EIS with the factual and technical decision that is to be made during the EA phase.

NEPA is an accountability statute for environmental policy. The EIS phase of the NEPA process, which culminates in an agency Record of Decision (ROD), arises directly from NEPA's text: federal agencies "to the fullest extent possible . . . *shall*" prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (emphasis added). Adhering to this statutory command, though, does not dictate an agency's choice about what will happen once the environmental study is completed. So long as the EIS fully and fairly evaluates the environmental impacts of a project, an agency "is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Methow Valley*, 490 U.S. at 350. That is, NEPA establishes a process that requires attention to environmental issues but leaves an agency free at the end to make a policy choice that reveals how it balances environmental issues with other concerns and values. That policy choice is made in the ROD, at the end of the statute-based EIS process.

The EA, on the other hand, is an invention embodied in the binding CEQ regulations that allows federal agencies the necessary breathing space to evaluate whether a given factual situation involving federal action actually triggers NEPA's statutory requirement of full environmental study. In the NEPA order of things, first comes the EA, then comes either the FONSI or the EIS (which, in turn, is followed by a ROD).

The EA phase of the NEPA process is focused on the question of "significance." A finding of "significance" triggers an EIS; a finding of no significance ends the NEPA inquiry. With narrow exceptions, the "significance" inquiry "involves primarily issues of fact." *Marsh*, 490 U.S. at 377. It is this fact-based nature of significance that provides the rationale for the judicially deferential standard that only "arbitrary and capricious" agency determinations are subject to invalidation. *Id.*

In their below-the-judicial-radar-screen creation of the NEPA hybrid known as the "mitigated FONSI," and use of it to avoid full EISs for projects that otherwise would require them, federal agencies have forced elements of the policy-based ROD into the fact-based "significance" determination. Were this amalgamation accomplished under law, through statutory amendment or regulatory revision, the tensions created in the NEPA process might be addressed and resolved. But, the "mitigated FONSI" movement has been extra-legal. That means that individual cases are the only way to relieve the unnecessary stresses caused by trying to force policy decisions into technical, fact-based pigeonholes.

In the case of the Longhorn Pipeline project, the agencies only exacerbated those already unnecessary stresses, and, in doing so, violated NEPA. The NEPA decision on the pipeline project was treated all along by the government's chief NEPA policy arm as a policy decision. CEQ wanted a negotiated, mitigated FONSI. EPA and DOT fell into open disagreement in the latter stages of the EA process about whether to stop at a FONSI or move to an EIS. Knowing and acknowledging that they confronted an obvious policy decision, the lead agencies

turned to CEQ to tell them the executive branch's environmental policy as it affected the pipeline.

In the end, the final Longhorn EA equates the "overall risk" from the pipeline to "societal risk." Final EA, 9-34. Then, the FONSI, resting on the EA, confronts the "qualitative decision" the agencies must make about the level of "risk" associated with the mitigated pipeline. App. 84a. Ultimately, the FONSI for the Longhorn Pipeline project rests on the agencies' conclusion that the future risks to the public and the environment – greater than a 15% chance of something bad happening during the project's projected life – are outweighed by the projected benefits of Longhorn's bringing gasoline to isolated markets.

This conclusion flies in the face of CEQ guidance, not necessarily because it is factually wrong,[16] but because it occurs at the wrong time in the wrong place. CEQ already has assigned the weighing of risks and benefits to the EIS phase, not the EA phase:

> The [CEQ] believes that the *weighing of risks and benefits* for the particular federal proposal at hand is properly done after completion of the *entire* NEPA process, and is reflected *in the Record of Decision*.

51 Fed.Reg. 15,621 (April 25, 1986) (emphasis added).[17]

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[16] It is, though, and the projected environmental impacts of the pipeline are significant by any reasonable measure. *See* below at 19 (arguing that government's own predicted level of residual risk rises to legal "significance").

[17] This is not merely a wayward observation by CEQ. It came with the promulgation of a revision to CEQ Regulation § 1502.22(b), reconsidering the much-debated role of the "worst case scenario" in

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The Fifth Circuit misunderstood this argument and relegated the discussion of it to a footnote. App. 17a n.5. Contrary to the suggestion there, Austin and the Collins petitioners do *not* argue that only cold, hard facts, untouched by agency judgment calls of any sort, can inform the EA-phase significance decision. That is not what happened in the mitigated FONSI for the Longhorn pipeline.

Instead, the agencies arrived at an uncertain estimation of risk – a greater than 15% threat of meaningful environmental and human harm – and concluded that such a level of risk was not sufficient to stop the Longhorn project from going forward as the owner desired. Austin and the Collins petitioners very well might be required to accept the accuracy of the estimated 15.3% risk under the arbitrary and capricious standard of judicial review, but that does not transform it into something other than an uncertain prediction about human and environmental impacts.[18] It does not follow, as the Fifth Circuit reasoned, that the conclusion the lead agencies drew from that estimation is nothing but a judgment call about significance.

There is no special agency expertise involved in the decision about whether a 15% or greater risk of harmful impacts is enough to require more environmental study. It

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NEPA analysis and replacing it with a procedural mechanism designed to force uncertainty issues to the forefront of EISs.

[18] Those challenging the pipeline vigorously contested the data and methodology leading to this estimate during the administrative proceedings. Issues from those disputes, however, are not being brought before the Court.

sets a dangerous precedent to allow uncertain statistical estimates based on inadequate data at the EA phase to be used to evade the full study procedurally mandated in an EIS. It is even more dangerous when, as here, the shaky estimates are undergirded by transparently flimsy data. Inadequate data at the EIS phase is sometimes unavoidable. But, at the EA phase, inadequate data can only mean that an EIS is called for. Otherwise, NEPA's EIS requirement is threatened with obsolescence and the entire NEPA structure is called into question.

Here, the decision is purely a policy call, separate from the NEPA concept of significance. Everything about the Longhorn NEPA process says this is so: the lead agencies' cry for policy direction; the front- and back-end policy direction given by CEQ; and the private negotiations between the agencies and Longhorn over how much the final mitigation plan would need to contain in order to let the project move into operation.

In effect, the government treated the hybrid EA/mitigated FONSI for Longhorn as the functional equivalent of an EIS/ROD. They even argued that is what happened, convincing the Fifth Circuit on this point. App. 18a n.6. Generalizing from that point, though, reveals its legal flaw. If extra-legal hybrid mitigated FONSIs are accepted as the functional equivalents of statute- and regulation-based EISs and RODs, the only rights afforded NEPA plaintiffs – which are purely procedural – are effectively obliterated. NEPA procedure would become whatever the bureaucratic "flavor of the month" says it is, not what the statute and regulations establish. The Court should act in this case to correct this bureaucratic drift away from the law of NEPA.

II. The Court should act to resolve the conflict between the Second and Fifth Circuits on the standard to be used for evaluating significance determinations at the EA phase in the era of mitigated FONSIs.

The NEPA statute and the CEQ regulations do not recognize the concept of mitigated FONSIs that drove the Longhorn process, and which increasingly drives all the government's NEPA machinery. In fact, the only extant guidance, found in CEQ's 1986 *Forty Questions*, rejects the concept. At the same time, "[t]he courts usually decide these cases on an ad hoc basis with no attempt to provide criteria under which the environmental significance of a federal action can be measured." D. Mandelker, NEPA LAW AND LITIGATION § 8.08[3] (2d ed. 1995). In other words, the government is using a legally rudderless approach to enforcement of what many consider its premiere environmental law.

The lower courts have divided on the standard agencies are to follow in deciding whether to stop at a FONSI or move to the EIS phase. In this case, the Fifth Circuit determined to evaluate mitigated FONSIs under the arbitrary and capricious standard. App. 17a. It expressly rejected the Second Circuit's "close call" standard described in another mitigated FONSI case, *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997) ("[w]hen the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared"). *See* App. 17a n.4. The Fifth Circuit described the Second Circuit's rule as in "seeming conflict" with the arbitrary and capricious standard holding sway in the Fifth Circuit. *Id.*

This actual conflict between the Fifth and Second Circuits is of critical importance in interpreting NEPA law, and guidance from the Court on this important issue is sorely needed, not simply to aid the lower courts in their review of NEPA decisions coming up from the agencies. It also is needed to aid the agencies themselves. The Longhorn dispute highlights that need.

The two lead agencies themselves could not agree on how to evaluate the facts and resorted to policy guidance from CEQ. CEQ could only direct the outcome; it could not provide legal advice on the standard to be applied by the agencies. The reason, of course, is that the only existing legal guidance says that mitigated FONSIs are not acceptable substitutes for EISs and RODs when a project's impacts otherwise cross the significance threshold – as the Longhorn project is conceded by EPA and DOT to have done.

By any common sense measure, the admission of a 15% to 20% estimate of "residual" risk from the Longhorn line's operation crosses the significance barrier. The reality in this case is that the agencies had to have actually viewed the level of mitigation attached to the Longhorn line as insufficient to lower the threat to insignificance. Several times, they proposed additional mitigation measures to Longhorn but were rebuffed. That can only mean that: (i) given the predetermined result that there would be no EIS, the lead agencies took what they could get; and (ii) the agencies really viewed the additional proposed measures that Longhorn rejected as necessary to the achievement of "insignificance."

The legally uncertain state of the role to be played by mitigated FONSIs in the NEPA process needs the Court's attention. This case provides the appropriate vehicle.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50956

ETHEL SPILLER; ET AL.,

Plaintiffs,

MARIAN COLLINS; BARTON SPRINGS/EDWARDS AQUIFER CONSERVATION DISTRICT; DAVID ROBERTSON,

Plaintiffs-Appellants,

CITY OF AUSTIN,

Intervenor Plaintiff-Appellant,

versus

THOMAS E. WHITE, Etc.; ET AL.,

Defendants,

THOMAS E. WHITE, in his official capacity as Acting Secretary of the Department of the Army; NORMAN Y. MINETA, SECRETARY, DEPARTMENT OF TRANSPORTATION; CHRISTINE T. WHITMAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES OF AMERICA,

Defendants-Appellees,

LONGHORN PARTNERS PIPELINE LP,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed December 12, 2003)

Before JOLLY, SMITH and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Before this court is the joint decision of two government agencies *not* to conduct a full-scale environmental impact study of the environmental effects of a proposal to use a pre-existing pipeline to transport gasoline and other petroleum products across the state of Texas. The government agencies did perform an initial environmental assessment but declined to engage in any further studies after concluding that the environmental impact of the proposed use of the pipeline would not be significant. The petitioners consist of a variety of Texas cities and governmental entities strongly opposed to the proposed use of this particular pipeline. They urged the district court – and they now urge this court – to order the government agencies to proceed with a full-fledged environmental impact study, contending that the agencies' finding of no significant environmental impact was arbitrary and capricious and contrary to law. The district court upheld the conclusion of the government agencies. We affirm.

I. Background

A. Statutory Background

This case arises under the network of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370d, "a statute drafted to ensure that federal agencies 'carefully consider detailed information concerning significant environmental impacts,' and at the same time 'guarantee that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'" *Sabine River Authority v. U.S. Dept. of Interior,* 951 F.2d 669, 676 (5th Cir. 1993) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989)). In essence, the NEPA framework requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for all "major federal actions significantly [affecting] the quality of the human environment." 42 U.S.C. § 4332(C).

The threshold determination of whether the effect of the proposed action is sufficiently "significant" to necessitate the production of an EIS is made by the preparation of an Environmental Assessment ("EA"). *Sabine River,* 951 F.2d at 677. The EA is a "concise" document that "briefly" discusses the relevant issues and either reaches a conclusion that preparation of an EIS is necessary or concludes with a "Finding of No Significant Impact" ("FONSI"). *Id.* An EA is conducted to "provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a)(1). "The EA is a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement – which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project – is

necessary." *Sabine River,* 951 F.2d at 677 (internal quotations and citations removed). Thus, the ultimate purpose of the EA is to lead to one of two findings: "either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact . . . necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS." *Id.* If the former is found, then the agency must proceed with a full blown EIS; if the latter is found, the agency issues a FONSI and has no further obligations under NEPA. *Id.*

Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result. *Robertson,* 490 U.S. at 350. NEPA "is a procedural statute that demands that the decision to go forward with a federal project which significantly affects the environment be an environmentally conscious one." *Sabine River,* 951 F.2d at 676. The statute "does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a 'hard look at environmental consequences.'" *Id.* (quoting *Robertson,* 490 U.S. at 350). Indeed, "NEPA does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Id.* Thus, while "[o]ther statutes may impose substantive environmental obligations on federal agencies, . . . NEPA merely prohibits uninformed – rather than unwise – agency action." *Id.*

B. Factual and Procedural History

This case concerns a pipeline that runs across the state of Texas between Houston and El Paso. Along its way, the pipeline passes through the City of Austin and across several rivers, streams and wetlands. In addition, it lies atop several aquifers and aquifer recharge zones. Exxon Pipeline Company originally constructed the pipeline between 1949 and 1950 and used it to transport crude oil until 1995. In 1997, Exxon sold the pipeline to Longhorn Partners Pipeline, L.P. ("Longhorn"), a Delaware limited liability partnership headquartered in Dallas, Texas. Longhorn purchased the pipeline intending to use it to transport gasoline and other petroleum products from Gulf Coast refineries to El Paso and then, perhaps, on to other states. The pipeline will eventually move approximately 225,000 barrels of gasoline per day across its lines.

On April 22, 1998, Mariane [sic] Collins, the Barton Springs-Edwards Aquifer Conservation District, and David Robertson filed a challenge to the proposed pipeline under NEPA.[1] In their original complaint, the plaintiffs sought injunctive relief, claiming that NEPA obligated the federal government to perform a full-fledged review of the environmental impact of the proposed use of the Longhorn

[1] The Collins plaintiffs all claim to be potentially affected by the proposed use of the pipeline. Marian Collins is a rancher in Kimble County, Texas and claims she is totally dependent on water drawn from the Edwards-Trinity Plateau Aquifer which is allegedly threatened by this pipeline. David Robertson lives in Hayes County and claims to rely on well-water drawn from this same aquifer. The Barton Springs-Edwards Aquifer Conservation District is a political subdivision charged with the protection of the Barton Springs segment of the Edwards Aquifer.

Pipeline. The suit was brought against Longhorn, the United States, the United States Department of Transportation ("DOT"), the Department of the Army, and the Environmental Protection Agency ("EPA"). Shortly thereafter, the City of Austin was allowed to intervene as the pipeline itself runs through the city.

After some initial negotiations, Longhorn and the government defendants entered into a settlement stipulation with the Collins plaintiffs and the City of Austin (collectively referred to hereafter as "the Collins plaintiffs"). Under this settlement, the EPA and the DOT (hereafter referred to as the "Lead Agencies") agreed to prepare an EA of the pipeline. The parties agreed that this EA would culminate in a FONSI or a notice of intent to prepare an EIS. Upon acceptance of the settlement stipulation, the district court issued an Agreed Order enjoining Longhorn from placing petroleum products in the pipeline until thirty days after the EA had been completed. The Agreed Order also specified that if the Lead Agencies issued a FONSI, the Collins plaintiffs could apply to the court to extend the injunction on the basis that the FONSI was arbitrary and capricious or otherwise in violation of the law under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706.

In accordance with the settlement stipulation, the Lead Agencies prepared an EA. On October 28, 1999, the Lead Agencies issued the draft EA and a preliminary FONSI for public review and comment (in accordance with 40 C.F.R. § 1506.6). The preliminary FONSI was a so-called "mitigated FONSI" which means that its issuance was predicated on Longhorn's engaging or agreeing to engage in certain mitigation measures. These measures were designed to address the potentially significant environmental

impacts of the pipeline and reduce the risks of them occurring to a level where they were deemed insignificant by the Lead Agencies. The Lead Agencies then held public hearings on the draft EA and the preliminary FONSI in Austin, Houston, Fredricksburg, Bastrop and El Paso and distributed hundreds of copies of the EA and FONSI in counties along the pipeline. Following these hearings, the submission of several thousand written comments on them, and after further deliberation, on November 3, 2000, the EPA and DOT issued a FONSI along with the final EA.

On February 5, 2001, the District Court granted the Collins plaintiffs leave to amend their initial complaints. In their amended complaint, the Collins plaintiffs contended that (1) the Lead Agencies' decision to issue a FONSI instead of preparing an EIS was contrary to NEPA and was arbitrary and capricious in violation of the APA, and (2) the Lead Agencies and Longhorn breached the settlement agreement. In response, Longhorn and the Lead Agencies claimed that the decision to issue a FONSI was not arbitrary and capricious and that they had complied with the settlement agreement. All parties filed summary judgment motions on June 10, 2002.

On July 19, 2002, the district court granted summary judgment in favor of Longhorn and the Lead Agencies. It found that the Lead Agencies' decision to issue a FONSI and not prepare an EIS was not arbitrary and capricious nor was it in any other way unlawful or in violation of NEPA. Specifically, it found that the Lead Agencies had taken the requisite "hard look" at the environmental impact of the Longhorn Pipeline and had reasonably determined that the impact would not be significant. In addition, it found that Longhorn had not breached the settlement agreement.

On August 20, 2002, the Collins plaintiffs filed a timely notice of appeal to this Court. In this appeal, the Collins plaintiffs take issue with the district court's finding that the Lead Agencies' decision to issue a FONSI and not to prepare an EIS was not arbitrary and capricious or otherwise in violation of the law. They urge this Court to reverse this finding, remanding with instructions that the district court remand the proceeding to the Lead Agencies for preparation of an EIS, or alternatively, for reconsideration of the FONSI in response to a judicial determination that it was issued in violation of NEPA.[2]

II. Standard of Review

Because NEPA dictates no particular substantive result, an agency decision not to conduct an EIS based on a FONSI is reviewable only on procedural grounds. A party objecting to such a decision brings such a challenge under the APA, 5 U.S.C. § 706(2)(A). Such parties face a high bar to success, however, as NEPA-related decisions are accorded a considerable degree of deference. The Supreme Court has held that in reviewing agency decisions involving alleged NEPA violations, courts are to uphold the agency's decision unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375 n.21 (1989) (quoting 5 U.S.C. § 706(2)(A)). Under this "highly deferential" standard, a

[2] The Collins plaintiffs do not appeal the district court's grant of summary judgment on their claim that Longhorn breached its settlement agreement. Thus, the sole issue before us on appeal is the validity of the Lead Agencies' decision not to conduct an EIS.

reviewing court has the "least latitude in finding grounds for reversal" of an agency decision and "may not substitute its judgment for that of the agency." *Sabine River,* 951 F.2d at 676 (internal quotations and citations omitted). Thus, with respect to this case, our deferential role as a reviewing court is limited to ensuring that the Lead Agencies took a "hard look" at the environmental consequences; we cannot interject ourselves within the area of discretion of the agencies as to the ultimate choice of the action to be taken. *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21 (1976). In doing so, we evaluate the record *de novo.* We undertake the same task as the district court, reviewing the materials submitted there and determining whether the agency's conclusions were arbitrary and capricious or contrary to law. *Sabine River,* 951 F.2d at 679.

III. Discussion

Before examining the Collins plaintiffs' arguments in detail, we should first note how exceedingly thorough and comprehensive the instant environmental assessment prepared by the Lead Agencies appears to be. The law only requires that an EA be a "rough-cut," "low-budget," preliminary look at the environmental impact of a proposed project. *Sabine River,* 951 F.2d at 677. This EA, however, is anything but rough-cut or low-budget. One and a half years in the making, it consists of four lengthy volumes numbering over 2,400 pages. It incorporates not only the analysis of agency personnel but also studies from independent experts in pipeline operations and safety, endangered species, hydrology, geology, lake and stream modeling, chemistry, risk analysis, and emergency response planning and implementation. It also incorporates the Lead Agencies' review of over 6,000 written comments

and numerous oral comments from six separate public meetings held throughout potentially affected areas in the state of Texas. Its issuance was predicated on Longhorn's agreeing to employ and maintain a variety of mitigation measures designed to lower the degree of identified risk of impact to acceptable levels. Indeed, in many ways, this EA is more akin to a full-blown EIS; it is unclear exactly what more the Lead Agencies could have done to evaluate the significance of this pipeline's impact.

We should also note that we find nothing objectionable about the fact that the issuance of the FONSI was predicated on Longhorn agreeing to certain mitigation measures. This Court has never explicitly upheld the issuance of a so-called "mitigated FONSI." This situation occurs when an agency or an involved third party agrees to employ certain mitigation measures that will lower the otherwise significant impacts of an activity on the environment to a level of insignificance. In this way, a FONSI could be issued for an activity that otherwise would require the preparation of a full-blown EIS. Other circuits have endorsed such a practice. For example, in *Cabinet Mountains Wilderness v. Peterson,* 685 F.2d 678 (D.C. Cir. 1982), the District of Columbia Circuit Court of Appeals held that "if, however, a proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required." Other circuits have concurred with this result. *See, e.g., C.A.R.E. Now, Inc. v. FAA,* 844 F.2d 1569 (11th Cir. 1988); *Greenpeace Action v. Franklin,* 14 F.3d 1324 (9th Cir. 1992); *Roanoke River Basin Ass'n v. Hudson,* 940 F.2d 58 (4th Cir.

1991); *Audubon Soc'y of Cent. Arkansas v. Dailey,* 977 F.2d 428 (8th Cir. 1992). While we have never explicitly upheld the use of a mitigated FONSI, we have implicitly endorsed their use in *Sierra Club v. Espy,* 38 F.3d 792, 803 (5th Cir. 1994) (holding that EAs satisfied NEPA where they considered appropriate alternatives, including mitigation measures), and *Louisiana v. Lee,* 758 F.2d 1081, 1083 (5th Cir. 1985) (holding that it was proper to consider restrictions placed on dredging permits in reviewing the agency's decision not to file an EIS and citing *Cabinet Mountains,* 685 F.2d at 682). Accordingly, we find no basis for objecting to the mitigated nature of FONSI issued here. This is particularly true given the fact that the original settlement agreement between the parties specifically endorsed the use of a mitigated FONSI.

Despite its comprehensive nature, the Collins plaintiffs take issue with the conducted EA and issued FONSI on three basic grounds. First, they contend that the Lead Agencies' assessment of the environmental impact of the pipeline was conducted in bad faith – that a political decision to issue a FONSI had been made beforehand and the entire process was specifically tailored to produce this result. Second, they assert that the Lead Agencies did not follow the guidelines set out by relevant NEPA regulations; specifically, they argue that the Lead Agencies failed to consider and evaluate all the requisite factors stipulated by these regulations. Finally, the Collins plaintiffs assert that even assuming a sufficiently comprehensive "hard look" was taken, the Lead Agencies' findings were arbitrary and capricious since a clear and rational examination of the record indicates that the Longhorn Pipeline would have a significant effect on the environment. The

Collins plaintiffs made all three of these arguments to the district court, which rejected them. We do so as well.

As to their first contention, the Collins plaintiffs essentially assert that the EA prepared here was a sham – contrived reports specifically tailored to rationalize a result that had already been predetermined. They assert that the decision to not prepare an EIS was a political decision made in advance by the Council on Environmental Quality ("CEQ") – an executive branch political organization – and forced on the Lead Agencies. Consequently, they argue that there was never any good faith attempt to take the required "hard look" at any potentially significant environmental effects the proposed action would have. Instead, the EA that ultimately issued was a foregone conclusion, whatever may have been the actual level of the significance of the pipeline's impacts.

We find no merit to this argument. Although it is true that agencies are expected to engage in good faith fact-finding, when their findings are challenged as arbitrary and capricious, the agencies' actions are judged in accordance with their stated reasons. *See, e.g., In re: Comptroller of the Currency,* 156 F.3d 1279 (D.C. Cir. 1998). Thus, the "actual subjective motivation of agency decisionmakers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior." *Id.* at 1279-80. There is no evidence here that the Lead Agencies acted improperly or in bad faith. The assessment they prepared was noteworthy for its exhaustive and extensive nature. Even more detrimental to the Collins plaintiffs' argument is that there is no evidence of a causal link between the Lead Agencies' decision to issue a FONSI and the alleged political machinations; the record suggests that the CEQ's involvement did not come until *after* the Lead Agencies

had made the initial decision not to prepare an EIS. Accordingly, there is no reason to overturn the Lead Agencies' decision on these grounds.

As to the second contention, the Collins plaintiffs accurately note that in taking a "hard look" at whether a proposed activity's impact will be significant, the relevant regulations instruct the Lead Agencies to consider both the "context" and the "intensity" of the impacts. 40 C.F.R. § 1508.27. According to these regulations, consideration of context means that "the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). Intensity is defined as "the severity of impact." 40 C.F.R. § 1508(b). The regulation then goes on to provide ten areas agencies should consider in evaluating "intensity." *See id.*[3] The

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[3] The ten listed factors are:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

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Collins plaintiffs contend that while the Lead Agencies' EA report accurately lists all ten factors as being components of their assessment, their failure to specifically address each of them separately and directly in this report requires reversal. We do not think, however, that the Lead Agencies' decision should be overturned on such formalistic grounds. Notably, the factors listed in the regulation do not appear to be categorical rules that determine by themselves whether an impact is significant. Instead, they are simply a list of relevant factors that should be considered in gauging whether an impact is "intense" and, therefore, significant. As such, all that would have to be shown is that all the factors were in some way addressed and evaluated; whether this was done in factor-by-factor fashion is irrelevant. We think that the record clearly indicates that each of these factors received adequate attention and evaluation in the

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(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Lead Agencies' decision-making process. Accordingly, we find no merit to this argument.

The Collins plaintiffs finally assert that, even assuming a comprehensive "hard look" was taken, the conclusion that the impact of the Longhorn Pipeline was not significant was still arbitrary and capricious since the Lead Agencies' conclusion was both grossly unsupported by the facts found and premised on bad science and/or inaccurate information. They argue that any reasonable consideration of the ten requisite factors would have led a rational decision-maker to conclude that the environmental impact of the Longhorn Pipeline would be significant. According to them, the EA report, the FONSI, and its underlying studies and findings are "unduly optimistic," "confusing," "unreasonable" and "defy common sense." To substantiate these allegations, they offer the detailed testimony of five expert witnesses retained by them.

We find no merit to this contention. The fact that the Collins plaintiffs or their experts take great issue with the factual findings and ultimate conclusions of the Lead Agencies does not render those findings and conclusions "arbitrary and capricious." As we noted earlier, government agencies – and not the federal courts – are the entities NEPA entrusts with weighing evidence and reaching factual conclusions:

> Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion.

Sabine River, 951 F.2d at 678.

Indeed, even if we were convinced that the Collins plaintiffs' experts were more persuasive than those relied upon by the Lead Agencies, we would still be compelled to uphold the Lead Agencies' finding so long as their experts were qualified and their opinions reasonable. *Id.*; *Marsh,* 490 U.S. at 378 ("[w]hen specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive.").

There is no evidence here that the Lead Agencies' experts are unqualified, nor do their opinions seem unreasonable to us. The Collins plaintiffs' experts point to a number of specific flaws they claim exist in the Lead Agencies' fact-finding or conclusions. These include allegations that the Lead Agencies should have conducted more comprehensive studies than they chose to do, that they utilized inaccurate and misleading statistical methodology in analyzing the risks of pipeline leakage, that they ignored or finessed the implications of key findings by the Lead Agencies' own experts in many instances, and that they inappropriately deferred to Longhorn for data and then relied uncritically upon it. Unsurprisingly, the Lead Agencies and Longhorn take issue with each of these assertions, answering each point-by-point in their briefs. After analyzing this back-and-forth between the parties, it seems clear that whatever the merits of the Collins plaintiffs' arguments that the Lead Agencies' decision-making process was less than perfect, it was not unreasonable. Instead, the dispute between the Collins plaintiffs and the defendants here is best classified as a classic battle of the experts, with each party asserting that their analysis is more reasonable than the other's. Under the highly

deferential standard afforded to agencies pursuant to NEPA, however, it is not the job of the federal courts to intervene in this fight.[4] The agencies have made their decision. It was not arbitrary and capricious. We are thus obliged to defer to their expert judgment.[5]

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[4] The Collins plaintiffs advance the argument that even if the environmental impact of the Longhorn Pipeline is not clearly significant, it is at least a close call and, as they claim, close calls are supposed to lead to an EIS. For this proposition of law, they rely on *National Audubon Soc'y v. Hoffman,* 132 F.3d 7, 13 (2d Cir. 1997) ("[w]hen the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared."). This Court, however, has never announced such a rule. Indeed, it would be difficult to do so, given the seeming conflict between such a rule and the highly deferential "arbitrary and capricious" standard set out in *Sabine River.*

[5] We should note that our deference to the Lead Agencies fact-finding and conclusions includes deference to their judgment as to whether any particular environmental impact of the proposed pipeline rises to the level of significance. The Collins plaintiffs argue that under the NEPA framework, the determination of whether an impact is significant must be objective, factual and quantitative in nature and should not involve any subjective, qualitative "judgment calls." They argue that the final EA issued here is inappropriately "larded" with such judgement calls, particularly on the subject of how much risk constitutes significant risk; it should therefore be overturned. The problem with this contention is that, as a practical matter, a determination of significance cannot be a completely objective inquiry because the meaning of the term "significance" for purposes of the NEPA statute is not clear on its face. *Vieux Carre Property Owners Residents and Assoc's, Inc. v. Pierce,* 719 F.2d 1272, 1279 (5th Cir. 1983) ("There is no hard and fast definition of 'significant' effect."). As such, determining whether significance exists inherently involves some sort of a subjective judgment call. *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 467 n.7 (5th Cir. 1973) (significance is "in large part a judgment based on the circumstances of the proposed action."). This must include judgment calls about how much risk equals significant risk, i.e., judgment calls about "acceptable risk." This observation has been made by the Second

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IV. Conclusion

As we noted earlier, NEPA does not guarantee any substantive results; all it ensures is that a particular process will be followed. Herein lies the problem for the Collins plaintiffs. They really don't want more process. Indeed, considering the extensive and comprehensive nature of the EA conducted here, it is unclear exactly what more process would involve.[6] What they really desire is a

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Circuit in *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983). There, the court explicitly held that agencies have "latitude in determining whether the risk is sufficient to require the preparation of an EIS." *Id.* at 746 n.14. This holding is sound because the "concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence." *Id.* at 738. That is not to say that any such judgment calls must be rubber-stamped by a reviewing court; they are still subject to the arbitrary and capricious standard of review. However, we do say that the simple fact that a judgment call was made is not enough to render the determination of significance (or non-significance) invalid under NEPA.

[6] The Lead Agencies and Longhorn have argued that requiring the preparation of an EIS here would be a waste of time and resources, given the fact that the EA prepared here contains all the functional elements of an EIS. We find this argument persuasive. In *Vieux Carre Property Owners Residents and Assoc's, Inc. v. Pierce*, 719 F.2d 1272, 1282 (5th Cir. 1983), this court upheld the decision of an agency not to conduct an EIS where the "objectives reflected in the [f]inal [EA] and the procedures followed in its preparation were extremely thorough and resulted in a document much akin to a detailed environmental impact statement." *But see State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985) (holding that an EA prepared by an agency in that case was not the functional equivalent of an EIS). Like the EA in *Vieux Carre*, the EA here has all the hallmarks of an EIS: there were public hearings and costly, extensive, and comprehensive environmental studies which produced reams of material data and resulted in 2,400 pages of analysis. Accordingly, it is unclear whether the time and expense required to prepare an EIS after an EA will result in any incremental benefits. Forcing the Lead Agencies to prepare an EIS would likely be unnecessarily duplicative and a waste of resources.

substantive result: convinced that it poses a great threat to the health and safety of its citizens and the environment in general, the Collins plaintiffs want this pipeline project killed. Unfortunately for their case, and whatever of the merits of that position, this outcome cannot be secured in this federal court proceeding. The Lead Agencies here have complied with the NEPA statute and its accompanying regulations in every way. They have conducted an exhaustive assessment of the environmental effects of this proposed pipeline and, after consideration, concluded that those effects were not significant. Whether we agree or disagree with that conclusion, we cannot call it arbitrary and capricious. Accordingly, we have no ability to disturb it. Therefore, the district court's grant of summary judgment in favor of the defendants is AFFIRMED in all respects.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ETHEL SPILLER,[1] MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, DAVID ROBERTSON,

Plaintiffs,

CITY OF AUSTIN,

Plaintiff-Intervenor

-vs-

Case No. A-98-CA-255-SS

ROBERT M. WALKER, in his official capacity as Acting Secretary of the Department of the Army; et al., RODNEY SLATER, in his official capacity as Secretary of Transportation, CAROL A. BROWNER, in her official capacity as Administrator of the Environmental Protection Agency, UNITED STATES OF AMERICA, and LONGHORN PARTNERS PIPELINE, L.P.,

Defendants

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[1] Although Ethel Spiller has withdrawn as the plaintiff in this case, her name is listed in the caption to avoid confusion.

ORDER

(Filed Jul. 19, 2002)

BE IT REMEMBERED on the 12th day of July 2002 the Court called the above-styled cause for hearing on all pending matters, and the parties appeared by attorney of record. Before the Court are the Plaintiffs' Motion for Summary Judgment [#295] and supplements thereto [# 307; 339], City of Austin's Motion for Summary Judgment [# 299], Defendant Longhorn Partners Pipeline, L.P.'s Motion for Summary Judgment [#300], and Federal Defendants' Motion for Summary Judgment [# 297]; Plaintiffs' response [# 325], City of Austin's response [# 317], Longhorn Partners Pipeline, L.P.'s response [# 319], and Federal Defendants' response [# 314]. Also before the Court are the Plaintiffs' Request for Preliminary Injunction [# 323], City of Austin's Request for Preliminary Injunctive Relief [# 308], Longhorn Partners Pipeline, L.P.'s memoranda in opposition thereto [# 321, 335], Federal Defendants' opposition thereto [# 340], and Plaintiffs' reply [# 337]. Finally, the Court considers the Defendants' motions to strike declarations filed by the Plaintiffs and the City of Austin in their summary judgment motions [# 311, 312, 315] and the Plaintiffs' and City of Austin's response thereto [# 331, 333]; as well as Longhorn Partners Pipeline, L.P.'s motion to strike documents filed by the City of Austin [# 320] and exhibits filed by the Plaintiffs in their response to the summary judgment motions [# 334]. Having considered the voluminous motions and responses, the case file as a whole, the four-volume Environmental Assessment, and the applicable law, the Court enters the following opinion and orders.

Factual and Procedural Background

This case concerns a pipeline that runs across the state of Texas, cutting a jagged path through the 731 miles of cities, towns, farms and ranches between Houston and El Paso, crossing rivers, streams and wetlands in ten major river basins, and lying atop several aquifers and aquifer recharge zones. Exxon Pipeline Company ("Exxon") constructed the 18-to 20-inch diameter pipeline in 1949 and 1950 and transported crude oil through it from Crane to Houston until around 1995. During that time, the pipeline experienced approximately 173 spills and leaks. In 1997, Exxon sold the pipeline to Longhorn Partners Pipeline, L.P. ("Longhorn"), a Delaware limited liability partnership headquartered in Dallas. Longhorn purchased the pipeline in order to transport gasoline and other petroleum products from Gulf Coast refineries to El Paso and on to Arizona, New Mexico and California. The pipeline will eventually move 225,000 barrels per day of gasoline from Houston to El Paso and Odessa.

On April 22, 1998, the Plaintiffs filed a challenge to the proposed Longhorn Pipeline Project ("the Pipeline") in this Court under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370d. Plaintiffs Marian Collins and David Robertson own land along the Pipeline in Kimble County and Hays County. Plaintiff Barton Springs – Edwards Aquifer Conservation District is a political subdivision of the state of Texas that conserves and protects groundwater within Travis, Hays, Caldwell and Bastrop counties. In their original complaint, the Plaintiffs sought injunctive relief requiring the federal government to perform a full-fledged review under NEPA of the environmental consequences of the Pipeline. The plaintiffs sued Longhorn, the United States, the United States Department of

Transportation ("DOT"), the Department of the Army ("Army"), and the Environmental Protection Agency ("EPA").[2] The Court allowed the City of Austin ("City") and Lower Colorado River Authority ("LCRA") to intervene as plaintiffs because the Pipeline runs through the City and the LCRA manages a large portion of the water supply over which the Pipeline travels.[3]

NEPA requires federal agencies to analyze, "to the fullest extent possible," the potential environmental impact of "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). When this case was young, Longhorn and the Federal Defendants argued the Pipeline is not a "major federal action" under NEPA because the Pipeline is privately owned and operated. Five federal agencies – FERC, DOT, EPA, the Army, and the Army Corps of Engineers – therefore refused to assume responsibility for conducting an environmental review under NEPA of the Pipeline. The parties clung to this position despite Longhorn's plans to use the Pipeline to transport petroleum products to other states and perhaps Mexico; despite Longhorn's need to obtain an easement over Army-owned Fort Bliss in El Paso County to complete the Pipeline; despite the Army Corps of Engineers' authority over pipeline construction and modification affecting navigable waterways; and despite

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[2] The plaintiffs also originally named the Federal Energy Regulatory Commission ("FERC") as a defendant, but the Court dismissed FERC because it was only involved in ratemaking.

[3] The Court dismissed the LCRA with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure on March 5, 2002 after the LCRA entered into a settlement with the EPA, DOT, United States, and the Army (collectively, the "Federal Defendants") in May 2001.

the location of the Office of Pipeline Safety ("OPS"), which is charged with administering DOT regulations to ensure pipeline safety, within the DOT. Needless to say, this Court found the federal agencies' conclusion that the Pipeline did not constitute a "major federal action" under NEPA not only arbitrary and capricious, but ridiculous, and on August 25, 1998, ordered the DOT and/or the EPA to conduct an environmental impact statement concerning the Pipeline in accordance with NEPA. *See* Order of Aug. 25, 1998, at 33-34. The Court also enjoined Longhorn from placing petroleum products into the Pipeline until this Court, the Fifth Circuit, or the United States Supreme Court orders otherwise. *See id.*, at 32.

On March 1, 1999, the parties entered into a Settlement Stipulation, under which the EPA and DOT agreed to prepare an environmental assessment ("EA") of the Pipeline. The EA would culminate in a Finding of No Significant Impact ("FONSI") or a notice of intent to prepare an Environmental Impact Statement ("EIS"). On March 5, 1999, the Court signed an Agreed Order vacating its previous injunction and enjoining Longhorn from placing petroleum products in the Pipeline until thirty (30) days after the agencies issued an EA decision, but not prior to Longhorn's implementation of mitigation measures upon which a FONSI might be conditioned and that are required to be implemented prior to or upon startup and the lead federal agency's approval of those measures. *See* Agreed Order of Mar. 5, 1999. The Agreed Order stated if the agencies issued a FONSI, the Plaintiffs could apply to the Court within 30 days to extend the injunction on the basis that the FONSI is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law

under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See id.*

In accordance with the Settlement Stipulation, the EPA and DOT prepared an EA along with their third-party contractor URS Corporation (formerly Radian International) ("Radian"). On October 29, 1999, the agencies released the draft EA and preliminary FONSI for public review and comment. *See* 64 Fed. Reg. 58404. The agencies held public hearings on the draft EA and FONSI in Austin, Houston, Fredericksburg, Bastrop and El Paso, and distributed hundreds of copies of the EA and FONSI in counties along the pipeline. *Id.* In addition to oral comments at the hearing, the agencies received over 6,000 written comments, which they responded to as described in Volume 4 of the final EA. On July 17, 2000, the agencies wrote a letter to George T. Frampton, Jr., the Acting Chair of the White House Council on Environmental Quality ("CEQ")[4] informing Frampton they "have reached an impasse on how to conclude the NEPA process" due to a "difference of view" and asking for the CEQ's recommendation on whether to complete an EIS or issue a FONSI. Plaintiffs' Motion for Summary Judgment, Ex. 10 ("Joint Letter"), at 1, 2. In the letter, the agencies disclosed the "Department of Justice has advised us that, on the present state of the record, it could defend either a FONSI or an EIS, and that the choice is a policy choice for our two agencies." *Id.* at 2. The record strongly supports the

[4] The CEQ promulgates regulations under NEPA that "tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]." 40 C.F.R. § 1500.1. The regulations are binding on federal agencies.

inference that the EPA supported preparation of an EIS, while the DOT preferred to issue a FONSI.

On September 7, 2000, the CEQ handed down a response to the agencies' request, recommending the agencies "now promptly finalize the EA and prepare a Finding of No Significant Impact." Plaintiffs' Motion for Summary Judgment, Ex. 14 ("Frampton Letter"), at 1. The CEQ concluded "virtually nothing could be gained in terms of useful environmental information or analysis by 'redoing' this extensive document as an EIS, other than sheer delay." *Id* at 3. On November 3, 2000, the EPA and DOT issued a FONSI along with the final EA. *See* Federal Defendants' Notice of Filing Finding of No Significant Impact and Final Environmental Assessment [# 159], Att. A ("FONSI").

On February 5, 2001, the Court entered an Order allowing Plaintiffs to amend their complaints and setting deadlines for Plaintiffs to file objections to Defendants' privilege logs and to file motions to include additional documents in the administrative record. *See* Order of Feb. 5, 2001. In their second amended complaint, Plaintiffs contend (1) the Federal Defendants's decision to issue a FONSI instead of preparing an EIS was contrary to NEPA and its corresponding regulations and was arbitrary and capricious in violation of the APA; and (2) the Defendants breached the Settlement Agreement. *See* Second Amended Complaint [# 201], at ¶¶ 51-53. The City and LCRA also filed amended complaints.

On March 25, 2002, after conducting an *in camera* review of nine volumes of documents the Federal Defendants withheld as privileged, the Court ordered the Federal Defendants to produce certain non-privileged

documents to the Plaintiffs and ordered the parties to file summary judgment motions. All parties filed summary judgment motions on June 10, 2002. The Plaintiffs and City argue the agencies' decision to issue a FONSI instead of prepare an EIS was arbitrary and capricious and urge the Court to vacate the FONSI, require the EPA and DOT to prepare an EIS and issue a Record of Decision concerning the Pipeline, and enjoin Longhorn from placing refined petroleum products into the Pipeline until thirty days after the issuance of the Record of Decision or until further order of this Court, the Fifth Circuit, or the United States Supreme Court. Additionally, the Plaintiffs and City seek summary judgment on their claim that the Defendants breached the Settlement Agreement. The Federal Defendants and Longhorn contend the decision to issue a FONSI was not arbitrary and capricious, the agencies followed the NEPA process, and the Defendants complied with the Settlement Agreement. Over four years after the Plaintiffs originally filed their NEPA challenge to the Pipeline, the process has finally come to a conclusion.

Analysis

I. Standard of Review under NEPA

The Plaintiffs and City contend the agencies should have prepared an EIS discussing the significant environmental impacts of the Pipeline. Under NEPA, agencies must prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Preparation of an EIS "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made

available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349, 109 S.Ct. 1835, 1845 (1989). Agencies are not required to prepare an EIS "for a non-major action or a major action which does not have a significant impact on the environment." *Sierra Club v. Hassell,* 636 F.2d 1095, 1097 (5th Cir. Unit B 1981). Agencies may first prepare an EA to determine whether a project's potential impacts on the environment are significant. 40 C.F.R. § 1508.9 (EA serves to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact."). After preparing an EA, an agency may issue a FONSI "if the agency determines on the basis of the environmental assessment not to prepare [an EIS]." 40 C.F.R. § 1501.4(e).

All parties agree NEPA provides a process only; it does not guarantee a result. *Robertson,* 490 U.S. at 350, 109 S.Ct. at 1846 (1989) (NEPA "does not mandate particular results, but simply prescribes the necessary process."). Because NEPA offers only procedural requirements, not substantive environmental requirements, it "only prohibits uninformed – rather than unwise – agency action." *Robertson,* 490 U.S. at 351, 109 S.Ct. at 1846. Given the absence of substantive rights within the statute, the "only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 2730 (1976) (citations omitted).

Because NEPA provides no independent right of action, plaintiffs must challenge agencies' NEPA decisions under the APA. Under the APA, courts must uphold agency decisions unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Therefore, the prohibitively narrow question before this Court is whether the agencies' finding that the Pipeline would have no significant environmental impacts was arbitrary and capricious. The Court's role is not to decide whether the undersigned believes the Pipeline will have a significant impact or even whether the agency's finding of no significance is unreasonable. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 109 S.Ct. 1851 (1989) (agency's decision not to prepare an EIS is reviewable under arbitrary and capricious standard); *Sabine River Auth. v. U.S. Dep't of Interior,* 951 F.2d 669, 677 (5th Cir.), *cert. denied,* 506 U.S. 823 (1992) (abandoning "reasonableness" standard in response to Supreme Court's holding in *Marsh*). The Fifth Circuit has warned "[u]nder this highly deferential standard of review, a reviewing court has the 'least latitude in finding grounds for reversal'" of an agency decision and "may not substitute its judgment for that of the agency." *Sabine River,* 951 F.2d at 678 (citation omitted).

In determining whether the agencies' decision to issue a FONSI rather than prepare an EIS was arbitrary or capricious, the Court "must studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Sabine River,* 951 F.2d at 678. The relevant factors are found in the CEQ regulation defining "significantly" for NEPA purposes. To determine the significance of environmental impacts, agencies must consider the "context" of the

project and the "intensity" of the impacts. 40 C.F.R. § 1508.7. The regulation identifies ten areas agencies should consider in evaluating "intensity":

(1) Impacts that may be both beneficial and adverse.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.

(8) The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic

Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27. The agencies must consider the above factors when determining whether a project may have a significant impact on the environment. A court may set a FONSI aside if the agency fails to consider the above factors or if the record shows the project may have a significant impact on the environment or the agency's review process was so flawed the court cannot determine whether the project may have a significant impact. *Fritiofson v. Alexander,* 772 F.2d 1125, 1238 (5th Cir. 1985), *overruled on other grounds by Sabine River,* 951 F.2d at 677. The agencies need not demonstrate the project will have absolutely no adverse effects on the environment. *E.g., Friends of Endangered Species, Inc. v. Jantzen,* 760 F.2d 976, 987 (9th Cir. 1985) ("[S]o long as significant measures are undertaken to 'mitigate the project's effects,' they need not *completely compensate* for adverse environmental impacts." (citation omitted)).

II. Summary Judgment Standard

All parties move for summary judgment in this case. A court may grant summary judgment if the moving party shows there is no genuine issue of material fact, and it is

entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding whether to grant summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party. *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir. 1997), *cert. denied*, 119 S.Ct. 868 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of producing evidence in the summary judgment process. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). The moving party must first show "if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof." *Hart*, 127 F.3d at 435. The nonmoving party must then provide "specific facts showing that there is a genuine issue for trial," and "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

In a case like this one, where the Court is reviewing an agency decision under the APA, summary judgment is the appropriate means for resolving claims because the Court is reviewing the legality of the agency action, not acting as the initial factfinder. In an APA case, the Court addresses the legal question of whether the agency action was arbitrary and capricious, so "the district court's review pursuant to a summary judgment motion cannot turn on

credibility determinations or conflicting factual inferences." *Sabine River,* 951 F.2d at 679. Therefore, the Court finds summary judgment appropriate in this case.

III. The Record before the Court

Defendants move to strike documents and declarations submitted by the Plaintiffs and City, arguing the Court's review of the agencies' decision must be confined to the administrative record. When reviewing an agency's NEPA action under the arbitrary and capricious standard, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 1244 (1973). The administrative record, which is designated by the agencies, consist of "'the full administrative record that was before the [administrative officer] . . . at the time he made his decision.'" *Milena Ship Mgmt. Co. v. Newcomb,* 995 F.2d 620, 624 (5th Cir. 1993), *cert. denied,* 510 U.S. 1071 (1994) (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415-16, 91 S.Ct. 814, 823-24 (1971). The Court cannot conduct its own analysis of the potential environmental impacts of the Pipeline based on unlimited evidence produced by both sides. *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744, 105 S.Ct. 1598, 1607 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

The Court can look outside the administrative record under some limited circumstances, however. *Sabine River,* 951 F.2d at 678 ("A reviewing court is to review the administrative record *as well as other evidence* to determine

whether the agencies adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary." (emphasis added) (quoting *Hassell,* 636 F.2d at 1097)). The Court may complete the administrative record with documents the agencies "directly or indirectly considered" when making their decision but did not include in the administrative record. *Bar MK Ranches v. Yuetter,* 994 F.2d 735, 739 (10th Cir. 1993). If a draft document is not protected by the deliberative process privilege, it should be included in the administrative record. *E.g., Public Citizen v. Heckler,* 653 F.Supp. 1229, 1237 (D.D.C. 1987).

The Plaintiffs move to complete the administrative record with its exhibits 13, 15, 16, 18, 21, 25, 27, 29, 35, 37, 38 and 41. The Defendants have not opposed this motion. Having reviewed the exhibits, the Court finds they contain non-privileged drafts and/or communications the agencies directly or indirectly considered in arriving at the FONSI decision. Accordingly, the Court considers these exhibits as part of the administrative record. In an apparent oversight, Longhorn did move to strike Exhibits 3, 4, 7 and 8 to Plaintiffs' Response to the summary judgment motions. However, the Court confirms these exhibits are part of the administrative record the agencies designated, and that motion is denied.

The City also submitted extra-record documents as exhibits to its summary judgment motion. Longhorn moves to strike four of these documents. The first, stamped USF & W/6 & 7 01101, is a handwritten document titled "F & W Position" and signed by Longhorn's president, Carter Montgomery. Longhorn contends there is no evidence the agencies relied on this document. However, the document

represents negotiations between Longhorn and the Fish & Wildlife Service, which were crucial to the agencies' issuance of the FONSI. *See* Frampton Letter, at 1. Therefore, the agencies likely considered Longhorn's concessions to the Fish & Wildlife Service, and the motion to strike is denied. The second and fourth documents, a letter dated August 1, 2001 and a fax cover sheet dated November 29, 2001, came into being after the FONSI decision and are therefore stricken. The City provides no evidence the third document, entitled "Peak Streamflow for Texas," was considered by the agencies. Accordingly, Longhorn's Motion to Strike [# 320] is granted in part and denied in part.

Under more limited circumstances, the Court can supplement the record with evidence not considered by the agencies in making their decision. Because one question before the Court is whether the agencies considered all relevant factors, the Court can consider extra-record evidence relating to the Plaintiffs' allegations that the agencies failed to consider all the relevant factors. *E.g., Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993) ("The extra-record inquiry is limited to determining whether the agency has considered all relevant factors and has explained its decision."). Otherwise, the Court would have no way of discerning what relevant factors were missing from the analysis. *Nat'l Audubon Soc'y v. Hoffman,* 132 F.3d 7, 14 (2d Cir. 1997). Additionally, the Court can supplement the record when "necessary to explain technical terms or complex subject matter." *Horseshoe Bend,* 988 F.2d at 997. However, plaintiffs cannot attempt to supplement the record for the sole purpose of competing in a battle of experts with an agency, because the Court must defer to the agency's selection of experts. *Marsh,* 490 U.S. at 378,

109 S.Ct. at 1861 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views persuasive."); *Sierra Club v. Froehlke*, 816 F.2d 205, 214 (5th Cir. 1987) (scientific disagreements among experts "are not the type that the federal courts are in business to resolve.").

Both the Plaintiffs and the City submitted expert declarations along with their summary judgment motions, and the Defendants have moved to strike them because they are not part of the administrative record. The Defendants also argue the declarations are inadmissible under Rule 702 of the Federal Rules of Evidence because the experts have no expertise dealing particularly with pipelines. However, the experts have other relevant areas of expertise, including hydrology, environmental engineering, statistics and environmental science. Additionally, the Defendants contend some experts rely on information obtained after the FONSI was issued. *Citizen Advocates for Responsible Expansion, Inc. (I-Care) v. Dole*, 770 F.2d 423, 233 (5th Cir. 1985) (the reviewing court "must assess the reasonableness of the agency's determination on the basis of information before the agency at the time the decision not to prepare an EIS was made."). Finally, the Defendants contend the experts offer inadmissible legal opinions. *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.2d 690, 697 (5th Cir. 2001).

Because this Court's task is to determine whether the agencies took a "hard look" at the relevant factors in evaluating the Pipeline's significance, the declarations the Plaintiffs and City submitted are admissible to the extent they highlight relevant factors the agencies did not consider. However, any legal conclusions and post-FONSI

evidence within the declarations and argumentation offered simply to contest the agencies' experts are not admissible. The Defendants' motions to strike are granted in part and denied in part accordingly.

Finally, the Plaintiffs move to strike the declaration of J.P. Sullivan, Jr., which Longhorn relies upon in its opposition to Plaintiffs' motion for preliminary injunction. Longhorn incorporated the declaration by reference, and it was filed in conjunction with civil action A-02-CA-001-SS, which has been consolidated with this case. The Plaintiffs contend they have not had an opportunity to depose Sullivan. Because Longhorn has not asserted the reliability of Sullivan, the declaration is stricken.

IV. Plaintiffs' and City's NEPA Claims

The agencies' decision to issue the FONSI was dependent upon Longhorn's agreement to implement many mitigation measures to reduce the environmental impacts of the Pipeline below the threshold of significance. In preparing the draft EA, the agencies employed a risk assessment model developed by W. Kent Muhlbauer to assess the physical integrity and risk of failure for approximately 8,000 segments of the Pipeline ("the Muhlbauer Model"). *See* FONSI, at 3. Taking into account approximately 75 variables, the Muhlbauer Model produced numerical index sum scores, which are intended to correlate with probability of failure. *Id.*; EA Vol. 1, at ES-12. Not surprisingly, the Pipeline scored poorly in this initial evaluation, which indicated the Pipeline had a higher probability of failure than the average pipeline. FONSI, at 3. Longhorn would have to mitigate the risk to avoid a significance finding. The agencies evaluated factors

such as population density, proximity to surface and ground water, and protected species habitat along the Pipeline and designated segments of the Pipeline "normal" (Tier 1), "sensitive" (Tier 2), and "hypersensitive" (Tier 3) based on the potential dangers to the environment. *Id.*, EA Vol. 1, at 16. The agencies set target index sum scores for each tier and directed Longhorn to develop a mitigation plan that would reduce the risk in each tier to the target score. FONSI, at 3-4. After Longhorn submitted its final mitigation plan with 40 specific mitigation measures, the agencies found the index sum scores had been reduced such that the residual risk of environmental harm is not significant. FONSI, at 10. In fact, the agencies found the mitigation measures "should render Longhorn's pipeline among the safest in the nation and dramatically safer than the minimum regulatory threshold established by OPS regulations." FONSI, at 10. The issue before this Court is whether this finding of insignificance, and subsequent issuance of the "mitigated FONSI," was arbitrary and capricious. FONSI, at 15.

A. Political Influences

As an overarching concern, the Plaintiffs and City contend the agencies predetermined the mitigated FONSI from the beginning as a policy decision, and the agencies simply tailored the EA to support that decision instead of taking a true "hard look" at the environmental consequences of the Pipeline. By inserting policy goals into the NEPA process, the Plaintiffs argue, the agencies denied their procedural NEPA rights. The Plaintiffs rely on the joint letter from EPA and DOT seeking the CEQ's recommendation on how to conclude the EA process, which states "the choice is a policy choice for our two agencies."

Joint Letter, at 2. Additionally, the Plaintiffs point to a deposition of Edward Ray Clark, a CEQ employee at the time of the FONSI, who testified about the "Clinton policy" of integrating and coordinating environmental and economic interests. *See* Plaintiffs' Motion for Summary Judgment, Ex. 1, at 148; 150. Clark also discussed the abundance of lobbyists representing both sides of the case. *Id.* at 62-63, 103-04. Clark specifically testified, however, the White House did not use its influence to affect the outcome of the EA. *Id.* at 74.

The Court has no doubt the White House's policy goals affected the ultimate decision to issue a FONSI, and Longhorn's expensive lobbyists may have been worth their hourly rate. However, the agencies did not request the CEQ's assistance until July 2000, long after they released the draft EA and preliminary FONSI in late October 1999. In other words, the agencies gathered the information, prepared the draft EA and received public commentary – in short, took a "hard look" – before turning to the CEQ for guidance. This Court's task is to ensure the agencies took a hard look at the relevant factors and to decide if their decision was arbitrary and capricious. Reasonable disagreement between two agencies based on a "difference of view" does not render the FONSI decision arbitrary and capricious, and an ultimate blessing by a political entity does not erase the careful study and designation of mitigation measures reflected in the EA. Joint Letter, at 2.

While the existence of White House influence does not spoil the EA process, it does add a certain stench to the FONSI. The major relevant impact of that stench is on the level of deference with which the Court views the decision. Courts must generally defer to agencies' factual determinations that are based on agency expertise. *Marsh,* 490

U.S. at 377, 109 S.Ct. at 1861 ("Because analysis of the relevant documents 'requires a high level of agency expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" (quoting *Kleppe*, 427 U.S. at 412, 96 S.Ct. at 2731)). Although certain analysis within the EA involves factual determinations, the CEQ's participation in the decision-making process inserts political policy goals into the final FONSI decision. Thus, the Court need not defer to the agencies' expertise in the FONSI decision itself, but may peer behind it into the EA. However, the Court's review of the FONSI decision is still limited to the highly deferential arbitrary and capricious standard.

B. Enforcement of the Longhorn Mitigation Plan

Another major concern of the Plaintiffs and City is the agencies' reliance on the Longhorn Mitigation Plan ("LMP") in issuing the FONSI without a guarantee the plan will be strictly enforced. The agencies acknowledge the Pipeline, without mitigation, would have significant impacts on the environment. *See* EA Vol. 1, at 9-1 ("The Lead Agencies have determined that mitigation measures are necessary to reduce the potential impacts of the proposed project to a level of insignificance."). With mitigation, the agencies predict the Pipeline will result in three or fewer leaks in the next fifty years, twenty times less than it would before mitigation. *Id.* at 9-32-33.

The CEQ supports the issuance of FONSI decisions that are dependent upon mitigation ("mitigated FONSIs") because a mitigated FONSI avoids the expense and delay of an EIS, giving the project applicant an incentive to volunteer mitigation measures beyond what agencies could force it to adopt. *See* FONSI, at 15. In this case, the

agencies believe Longhorn's voluntary mitigation measures as part of the FONSI are more comprehensive than they would be following an EIS. *Id.* at 16 ("[T]he Longhorn EA has resulted in greater mitigation than would likely result from the EIS process.").

The Fifth Circuit has acknowledged courts should consider mitigation measures when evaluating an agency's decision not to prepare an EIS. *Louisiana v. Lee,* 758 F.2d 1081, 1083 (5th Cir. 1985) ("[T]he only realistic course of action is to consider the conditions in reviewing the [agency's] decision not to file the impact statement."). Other circuits have upheld mitigated FONSIs under the arbitrary and capricious standard. *E.g., Greenpeace Action v. Franklin,* 14 F.3d 1324, 1335 (9th Cir. 1993); *Audubon Soc'y of Central Arkansas v. Dailey,* 977 F.2d 428, 435-36 (8th Cir. 1992); *Roanoke River Basin Ass'n v. Houston,* 940 F.2d 58, 62 (4th Cir. 1991); *C.A.R.E. Now, Inc. v. FAA,* 844 F.2d 1569, 1574 (11th Cir. 1988); *Cabinet Mountains Wilderness v. Peterson,* 685 F.2d 678, 682 (D.C. Cir. 1982).

The Plaintiffs and City do not contend the mitigated FONSI is improper; instead, they express concern about whether the LMP will be enforced. Enforceability of mitigation measures is an important factor for the Court to consider. *Lee,* 758 F.2d at 1083 ("This is not an instance where the proposed mitigating conditions consist of vague statements of good intentions by third parties not within the control of the agency. . . . Rather, here the conditions are legally enforceable by the [agency]."). The City takes issue with Longhorn's freedom to choose the mitigation measures in negotiation with Radian, implying Longhorn weaseled out of some mitigation requirements by taking control of the process. *See* City's Motion for Summary Judgment, Ex. J at URS 022550, 000035. However, it is

important to recall Longhorn is the project applicant and as such is responsible for mitigating the Pipeline's risk below a level of significance, so is logically more involved in designing mitigation measures than the agencies. Additionally, many of Longhorn's mitigation promises go beyond what the agencies could require under law. EA Vol. 1, at 9-1 ("These mitigation measures, in many cases, go substantially beyond the legal requirements that apply to U.S. hazardous liquid pipelines.").

While the agencies could not have required such mitigation measures, the LMP enables the agencies to monitor and enforce them. First, Longhorn committed to the mitigation measures unless authorized to modify them by the DOT. EA Vol. 1, at 9-55; Vol. 2, App 9C, at 51. As the EA notes, "This restriction on their operating control is not placed on any other pipeline in the country." EA Vol. 1, at 9-55. Additionally, under DOT regulations, pipeline companies must adhere to the procedures in their own operation and maintenance manual. 49 C.F.R. § 195.401(a). Longhorn has incorporated the LMP into its operation and maintenance manual. EA Vol. 4, at 9-29. The DOT will monitor Longhorn through progress reports on the mitigation plan Longhorn must submit quarterly the first two years and annually thereafter. EA Vol. 1, at ES-23; 9-13. Longhorn will make these progress reports available to the public via its web site. *Id.*; EA Vol. 2, App. 9C, at 50.

The City contends even if the DOT has the authority to enforce the LMP, it will likely not do so because of the OPS's pathetic enforcement record. *See* City's Motion for Summary Judgment, Ex. A at DOT 005850; DOT 005150; OR/DOT 005490. However, if courts were to make decisions based on federal agencies' potential to be ineffectual,

the words "arbitrary and capricious" would lose their meaning. Additionally, unlike most other pipeline companies, Longhorn has committed to enact the measures and file progress reports without waiting for the OPS to come sniffing around the Pipeline.

Having reviewed the LMP and the record as a whole, the Court finds the agencies' decision to rely on the LMP in issuing the FONSI was not arbitrary and capricious. Among other things, the LMP requires Longhorn to replace the segment of pipe that runs through the Edwards Aquifer recharge and contributing zones with thick-walled pipe covered in concrete; perform an in-line inspection of the pipeline at least every three years; patrol the sensitive and hypersensitive areas every two and a half days, and the remaining areas weekly; enhance public education programs to increase awareness; and refrain from transporting products containing methyl tertiary butyl ether ("MTBE") or similar additives through the Pipeline. EA Vol. 2, App. 9C, at 5; 14; 18-19; 29; 39; 42 & 49. Longhorn must hire a third-party contractor, approved by the DOT, to conduct an operational reliability assessment ("ORA") of the Pipeline at least annually, and will implement recommendations from the ORA as approved by the DOT. EA Vol. 1, at 9-12-13. The LMP even requires Longhorn to build a refugium for the Barton Springs salamander, the City's favorite bottom-dwelling reptilian. EA Vol. 2, App. 9C, at 46-48. While these measures do not and cannot confirm with absolute certainty the Pipeline will be safe, the agencies' risk assessment model indicates the measures reduce the risk below a level of significance.

C. Uncertainty of Muhlbauer Model

The agencies' quantitative assessment of pre-and post-mitigation risk relies upon the Mulhbauer Model. The Plaintiffs and City contend this model is untested and the results from it are necessarily uncertain. Uncertainty is a factor for courts to consider under the CEQ's definition of "significance." 40 C.F.R. § 1508.27. The EA acknowledges the index sum values, which the Mulhbauer Model uses to measure probability of failure, "generally correlate" but do not definitively correlate with failure probability. EA Vol. 1, at 9-8. Additionally, the "leak frequency estimates have a high degree of uncertainty, primarily due to the limited amount of data available." *Id.* at 9-35.

While the Muhlbauer risk assessment may not be absolutely certain, the record indicates the Muhlbauer Model is the most widely accepted pipeline risk assessment model available. EA Vol. 4, at 6-27 (the Muhlbauer Model "appears to be the most widely adopted pipeline risk model currently available."). And as the Defendants point out, the Plaintiffs do not suggest an alternative model. Moreover, the agencies' selection of the Mulhbauer Model involves precisely the type of scientific expertise to which courts must defer. The agencies selected the Muhlbauer model over contrary public commentary (as well as internal debate), finding "[i]t is well suited to the EA application in terms of comprehensiveness and its ability to indicate improvement opportunities (mitigations)." *Id.*; Plaintiffs' Motion for Summary Judgment, Ex. 19 at EPA 017009-11. The agencies acknowledged the uncertainty of the predictions and ultimately decided the model was the best available. EA Vol. 1, at 6-58 ("As with other estimates, this approach has considerable uncertainty but is felt to be the most realistic appraisal of post-mitigation leak rates.").

Most importantly, the Plaintiffs' quibble with agencies' use of the Muhlbauer Model does not detract from the more relevant fact that the agencies engaged in the NEPA process and underwent an in-depth risk analysis of the Pipeline.

The Plaintiffs and City also argue the agencies altered the Muhlbauer Model by removing the consequences portion of the analysis to support their FONSI decision. The EA explains the agencies chose to omit the consequences factor in favor of the tiering approach for analyzing impacts. EA Vol.1, at 6-16; FONSI, at 3 n.3. This alteration does not mean the agencies did not analyze the impacts at all; it merely means the agencies made a choice about which method would best suit this particular project – a choice that merits deference.

Finally, the Plaintiffs contend the agencies illogically relied on spill data from the DOT/OPS database instead of the historic spill data from the Exxon pipeline itself, despite the inaccuracies within the DOT/OPS database. *See* Plaintiffs' Motion for Summary Judgment, Ex. 21-23. The EA discusses the Exxon historical spill data and its limitations. EA Vol. 1, at 5-78; 6-58-59. Additionally, contrary to the Plaintiffs' assertion, the agencies contend the spill frequency estimates do utilize the historic spill data. *Id.* at 5-78-79. The EA clearly does not ignore the historic spill data from the Exxon pipeline, but discusses it at length. *Id.* at 5-69-76. Therefore, this contention does not demonstrate the agencies' reliance on the Muhlbauer Model was arbitrary and capricious.

D. Old Pipe

The Plaintiffs and City contend the agencies did not adequately consider the dangers associated with the approximately 450 miles of the Pipeline constructed in 1950. EA Vol. 1, at 3-2. They point specifically to electric resistance welding ("ERW") pipe, which makes up over fifty percent of the Pipeline and has a "higher susceptibility to certain failure mechanisms" than newer pipe. *Id.* at 5-7. ERW pipe has a longitudinal weld seam that renders the pipe more vulnerable to corrosion and fatigue. *Id.* The EA estimates ERW pipe was responsible for one major spill and possibly six smaller spills during the Exxon pipeline's operation. *Id.* at 5-82. While ERW pipe is not illegal, government agencies have issued advisories about its use. *Id.* at 5-8.

Understandably, the age of the Pipeline concerned the agencies, and the EA acknowledges and confronts those concerns. To counter the effects of age, the agencies required mitigation measures. Based on hydrostatic (water-pressure) testing and in-line ("smart pig") testing of the Pipeline in 1995, Longhorn has repaired and replaced some pipe. *Id.* at 5-11-15. In the LMP, Longhorn committed to further hydrostatic and in-line testing during the operation of the Pipeline. EA Vol. 2, App. 9C, at 28-29.[5]

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[5] The Plaintiffs and City contend the in-line inspection data from 1995 is no longer reliable, since the results are only valid for a finite period. EA Vol. 1, at 5-13. However, the EA also notes "the opportunity for operational-related anomaly growth was limited or non-existent because the pipeline was not in operation since the 1995 inspection." *Id.* at 5-15. Additionally, Longhorn has committed to perform further in-line testing within three months of startup. FONSI, at 5.

The EA demonstrates the agencies acknowledged the ERW pipe's risks as a relevant factor in its significance determination. The EA does not conceal the hazards of the old pipe, but highlights them and addresses ways to mitigate the danger. Ultimately, the agencies decided Longhorn's mitigation measures would adequately resolve those dangers and reduce the project's impact below the level of significance. Congress has only authorized federal courts to ensure the agencies considered all the relevant factors and has not permitted this Court to decide whether the Court would let Longhorn shoot gasoline through 52-year-old pipe for 731 miles where failure would be disastrous for thousands of people and for years to come. Unfortunately, on this record, the Court cannot say the agencies did not consider the Pipeline's age as a relevant factor in its significance determination.

E. Pump Stations

The Plaintiffs and City protest that the agencies ignored the environmental impacts of the nineteen pump stations along the Pipeline, even though the pump stations are clearly relevant to the probability of failure due to their historic failure rate on the Exxon pipeline. Longhorn plans to construct new pump stations and refurbish existing stations, and at the time of the EA the agencies did not know where all the future pump stations would be. EA Vol. 1, at 3-6-3-7; 3-1 n. 1; EA Vol. 2, App. 3D. The Exxon spill data shows four times more major spills occurred at pump stations than along the pipeline: 147 leaks in 29 years. *Id.* at 5-117; 6-18.

The agencies did exclude the pump stations from the risk assessment analysis and probability of failure estimates. EA Vol. 2, App. 9B at 9B-A-1 ("Pump stations are

excluded from this [probability of failure] analysis, but could be dealt with separately in a similar manner."). As the EA explains, the agencies decided not to include the pump stations in the risk assessment analysis because pump stations have different risk considerations than the rest of the Pipeline. EA Vol. 1, at 6-18. Additionally, the predictive power of the historic leak data for the Exxon pump stations is limited because Longhorn has completely refurbished the old stations and has constructed (or will construct) at least a handful of brand-new stations. *Id.* Instead of applying the risk assessment analysis to the pump stations, Longhorn analyzed and will analyze each pump station using Hazard and Operability Studies ("HAZOPS"), a risk assessment technique that "relies on a structured and comprehensive question-answer approach and expert participants to identify and remedy potential safety and operability issues." EA Vol. 1, at 9-25; Vol. 4 at 6-3; 6-33. The EA addresses a January 1999 HAZOPS analysis of the existing pump stations, concluding "[r]esults of these studies revealed some safety and operability issues that did not appear to be critical." EA Vol. 1, at 6-19. The agencies determined the HAZOPS analysis is the appropriate risk assessment method for the Pipeline's pump stations.

Additionally, Longhorn has committed to important mitigation measures concerning its pump stations. Because new pump stations may be located over karst aquifers, Longhorn must prepare site-specific environmental studies for each new pump station at least 180 days before construction begins. EA Vol. 1, at 7-92; Vol. 2, App. 9C at 49. Additionally, the above-ground storage tanks within the pump stations will be surrounded by secondary containment systems. EA Vol. 2, App. 9C at 42. While only five

percent of the volume of pump stations spills from the Exxon pipeline occurred after 1982, most of those spills were attributed to tank problems. EA Vol. 1, Figs. 5-17, 5-18; Plaintiffs' Motion for Summary Judgment, Ex. 34. Pump stations are fenced and locked, although unmanned, and will be under video surveillance. EA Vol. 1, at 6-18; Vol. 2, App. 9C at 40. Each pump station will be remotely controlled and operated by the centralized Supervisory Control and Data Acquisition ("SCADA") system in Tulsa, Oklahoma. EA Vol. 1, at 5-22. Additionally, the stations can be locally controlled by emergency shutdown devices and alarms located at each station, and low suction pressure will cause the pump to shut down automatically. *Id.* at 5-23. Longhorn has also committed to pump station inspections every two and a half days in sensitive and hypersensitive areas. EA Vol. 2, App. 9C at 39.

The EA demonstrates the agencies did consider the risks associated with pump stations, even though they did not include pump stations in the risk assessment analysis. Based on the causes of Exxon pump station spills and Longhorn's mitigation commitments addressing those causes, the agencies found the minor leaks that could occur at pump stations would be "generally small, confined to the facility site, quickly discovered, and soon remedied." FONSI, at 11 n.9. In other words, the agencies considered the pump stations as a relevant factor and determined their risk to be insignificant.

F. Impacts on Water Supply

Chapter 7 of the EA devotes a section to impacts on ground water and a section to impacts on surface water. Nevertheless, Plaintiffs contend the EA fails to analyze

the Pipeline's impacts on private wells and the Edwards-Trinity Aquifer. The City attacks the EA's water modeling studies concerning surface water. The Court will not critique the agencies' chosen water modeling methodology, because the choice of methodology deserves deference. The Court will, however, address the Plaintiffs' claims that the agencies did not consider the relevant factors concerning the Edwards-Trinity Aquifer or private wells.

The EA defines the location of the Edwards-Trinity Aquifer, which is one of the largest aquifers in Texas, and describes it as "highly vulnerable to contamination." EA Vol. 1, at 4-20-21. The EA discusses the potential for karst features and the associated increase in vulnerability of ground water resources. *Id.* at 4-24-25; 7-27. Although the EA acknowledges not much study has been done on the Edwards-Trinity Aquifer and the agencies did not perform a ground water modeling study on it,[6] the EA describes the characteristics of the aquifer and estimates "any spill of 500 bbl or greater has a 50 percent probability of occurring at a place where it is more likely to impact ground water supplies." *Id.* at 7-25; 7-28. The EA classifies this estimate as "conservative." *Id.* at 7-28. Thus, contrary to Plaintiffs'

[6] The Plaintiffs seem to argue the agencies should have commissioned an in-depth study of the Edwards-Trinity Aquifer before reaching the FONSI decision. However, such in-depth study is not required by NEPA, and the agencies would not have been obligated to perform such a study even as part of an EIS. *E.g.*, *Utah Shared Access Alliance v. United States Forest Serv.*, 288 F.3d 1205, 1211 (10th Cir. 2002) ("The Forest Service concedes it did not undertake a comprehensive watershed study on the magnitude of the one described in the [Guide to Predicting Sediment Yields], but correctly points out that NEPA did not mandate such a massive study as a prerequisite to action.") (citing *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974)).

assertions, the agencies discussed the relevant features of the Edwards-Trinity Aquifer and reached a conclusion about its vulnerability to leaks and spills. Additionally, one of the appendices to the EA is a technical memorandum prepared for Radian regarding groundwater modeling for certain aquifers; this document discusses the Edwards-Trinity Aquifer for ten pages. After studying the aquifer, the agencies' decision not to classify the Pipeline located atop the Edwards-Trinity Aquifer as sensitive or hypersensitive is entitled to deference.

The Plaintiffs and City contend the agencies did not take private wells into account in determining the Pipeline's potential impacts on the water supply. It is true the agencies did not consider private wells in their determination of sensitive and hypersensitive areas. EA Vol. 2, App. 7A, at 2; Vol. 1, at 7-32. However, the agencies did consider the impact on private wells as "a criterion for requiring additional mitigation measures for the entire pipeline, and for requiring mitigation directed at addressing the needs of well owners." EA Vol. 1, at 7-32. While the draft EA apparently assumed the private well owners could seek remedies through litigation, the comments convinced the agencies a solution that did not depend on at least a year's delay and legal fees would be preferable. EA Vol. 4, at 9-37-38. Thus, Longhorn provided a separate mitigation plan for domestic water wells, whereby it will identify private wells along the Pipeline, provide early warning to owners in the event of a spill, monitor private wells for contamination should a spill occur and provide mitigation measures in the case of contamination. EA Vol. 2, App. 9F; App. 9C at 45. The Plaintiffs argue the mitigation plan only applies to wells within 2.5 miles on each side of the Pipeline. While this may be a valid complaint, it is a far

cry from contending the EA does not consider the relevant factor of the Pipeline's impacts on private wells. On the contrary, the Court finds the agencies adequately considered this factor and concluded it was insignificant given Longhorn's mitigation plan addressing the potential impacts. As a whole, the agencies gave in-depth consideration to the Pipeline's potential impacts on surface and ground water sources and the potential for drinking water contamination.

G. Five-Minute Shutdown

The Plaintiffs and City contend the EA relies on a five-minute shutdown estimate that is unrealistic and thereby underestimates the impact of a spill. They contend the Pipeline can only shut down in five minutes in the best-case scenario. The Plaintiffs point to reservations agency and Radian personnel expressed about the feasibility of the Pipeline being able to shut down within five minutes of detection of a spill. Plaintiffs' Motion for Summary Judgment, Ex. 37; 40.

The Pipeline's leak detection systems are part of Longhorn's mitigation plan. The five-minute shutdown estimate is based on a worst-case scenario, a full breach of the Pipeline and the accompanying large volume spill. The SCADA system discussed above will detect a large-volume spill and set off alarms in the remote monitoring center in Tulsa, prompting personnel to shut down the remote-controlled pumps and valves along the Pipeline. EA Vol. 4, at 6-19; Vol. 2, App. 9C, at 31. The pumps can also shut down automatically in response to low suction pressure, which would result from a large leak. EA Vol. 4, at 6-19; Plaintiffs' Motion for Summary Judgment, Ex. 37. While

the five-minute shutdown is only realistic for large leaks, smaller leaks that take longer to detect will result in approximately the same amount of volume discharged. EA Vol. 2, App. 6B, Table 1. Longhorn has also committed to install, prior to startup, a hydrocarbon sensing leak detection cable system in the Edwards Aquifer Recharge Zone and the Slaughter Creek watershed of the Edwards Aquifer Contributing Zone, which will detect a leak of .0030467 barrels per hour in twelve to 120 minutes. EA Vol. 2, App 9C, at 32.

The record demonstrates the agencies considered the same concerns the Plaintiffs and City raise and required Longhorn to clarify and justify the five-minute response time. Plaintiffs' Motion for Summary Judgment, Ex. 40. The agencies did not blindly rely on the estimate or fail to explain or discuss it in the EA. While the Plaintiffs and City may be skeptical the leak detection system will actually work, this skepticism is not grounds for finding the agencies' decision arbitrary and capricious.

H. Cumulative Impact of Other Pipelines

The Plaintiffs and City allege the agencies failed to consider the potential cumulative impacts of the Pipeline from its shared corridor with other pipelines. The CEQ's regulatory definition of "significance" requires agencies to consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27. The United States Court of Appeals for the District of Columbia Circuit recently held the Federal Aviation Administration should have considered

the cumulative impact of construction of a new airport on noise pollution in a nearby national park. *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 347 (D.C. Cir. 2002). In analyzing cumulative impacts, agencies should consider: "(1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate." *Fritiofson*, 772 F.2d at 1245.

Chapter 7 of the EA discusses cumulative impacts of the Pipeline and concludes there are no cumulative impacts from construction or normal operation of the Pipeline. EA Vol. 1, at 7-86-87. The EA also addresses the potential cumulative impacts from the other pipelines located along the same corridor as the Pipeline. EA Vol. 1, at 7-87; Vol. 4, at 6-44. Longhorn shares a corridor with several other pipelines and runs parallel to two of them for approximately 265 miles, one of which transports crude oil and the other natural gas. EA Vol. 1, at 7-88. The EA details the proximity of the parallel pipelines and the potential safety risks such as exposed pipe. *Id.* at 7-89-90. Because "[t]he potential influence of one pipeline on another would depend on the separation distances between pipelines," the agencies examined the distance between the pipelines, especially in Harris and Travis Counties. *Id.* at 7-89. The pipelines do not come within 19 feet of each other. *Id.* at Table 7-11. The agencies noted "[m]ultiple pipelines result in a higher absolute risk to a receptor than a single pipeline(s) in the same vicinity.

Assuming pipelines pose the same risk, the combined risk would be three times the risk of one pipeline." *Id.* at 7-90. Despite the greater combined risk, the agencies "concluded that the likelihood of such an accident is low," because the DOT knew of only one accident in ten years where a pipeline explosion has caused damage to an adjoining pipeline. *Id.* Based on this conclusion, the agencies did not include the potential for a chain reaction in the formal risk assessment analysis. *Id.* at 6-26. The agencies also noted the potential benefits of multiple pipelines such as increased surveillance and public awareness. *Id.* at 7-91. While the Plaintiffs critique the EA's analysis of cumulative impacts, they cannot show the agencies failed to consider them. On the contrary, the EA analyzes the general cumulative impacts of the Pipeline and the specific issue of proximity of other pipelines.

I. Third-Party Damage and Sabotage

The Plaintiffs and City contend the agencies did not adequately consider the impacts of third-party damage, particularly sabotage, when third-party damage was the primary cause of spills on the Exxon pipeline. EA Vol. 1, at 5-82 ("The primary cause of pipeline spills of 50 bbl or greater in size has been outside force."). The potential for third-party damage is exacerbated by exposed and shallowly buried pipe. *Id.* at 5-81 (discussing shallowly buried pipe). The EA addresses the vulnerability of exposed pipe and shallowly buried pipe. *Id.* at 5-19 ("Exposed pipe, while reducing the chance of accidental damage from excavation strikes, might be a concern because of the increased vulnerability to outside force damage other than excavation (e.g. vandalism) and because of the potential for coating deterioration and atmospheric corrosion. It is

not clear whether an exposed pipe has more risk of third-party damage than buried pipe. It is often assumed that shallow burial, less than six inches, for example, is worse than a full exposure since the cover is inadequate to provide much protection, but does conceal the presence of the pipeline."). Longhorn surveyed the exposed pipe and the EA identifies the exposed areas. *Id.*; *see also* Figure 5-10; Table 7-8. The EA also considers the vulnerability of exposed pipe at stream and ditch crossings. *Id.* at 5-21 ("[S]maller stream and ditch crossings in the Houston area, where there is potential vulnerability to vandalism, show evidence of use as foot bridges, graffiti painting, and tampering with the protective coatings.).

In addition to describing the potential vulnerability of the Pipeline to third-party damage, the EA includes third-party damage as one of the four factors contributing to probability of failure in the risk assessment analysis. *Id.* at 6-24-25. The Plaintiffs attack the agencies' decision not to include the risk of sabotage in the formal risk assessment. The EA explains the agencies' decision as follows: "The risk of sabotage is difficult to fully assess since such risks are so situation-specific and subject to rapid change over time. The assessment would be subject to a great deal of uncertainty, and recommendations would be problematic. This type of assessment is not thought to add significant value to the EA." *Id.* at 6-25. While the Plaintiffs may not support this choice, the agencies considered the risk of sabotage and made a reasoned decision not to include it in the risk assessment. However, Longhorn committed to mitigation measures to address the risk of sabotage and other third-party damage, including clear and bountiful pipeline markers, frequent aerial and ground surveillance, excavator education and public education. EA Vol. 2, App.

9C at 89-92; App. 9B, at 9B-B-1.[7] Accordingly, the Court finds the agencies considered third-party damage and sabotage as relevant factors in the EA analysis.

V. Breach of Settlement Stipulation

While many of the above NEPA arguments relate to the Plaintiffs' and City's claim of breach of the Settlement Stipulation, some contentions relate more directly to their contract claims. Under the Settlement Stipulation of March 1, 1999, the agencies agreed to prepare an EA on the Pipeline that (a) identifies surface and ground water resources, land resources and uses, and flora and fauna in the vicinity of the Pipeline; (b) discusses the environmental consequences of the Pipeline, including a discussion of pipeline integrity and a risk assessment analysis; and (c) identifies and analyzes alternatives. EA Vol. 2, App. 1A. The Court finds the Defendants did not breach the Settlement Stipulation in any of the areas discussed above. The Court discusses the remaining breach arguments

[7] The Plaintiffs take issue with Longhorn's decision not to include warnings to deer hunters in its educational materials. However, the EA addresses why Longhorn does not include such warnings. EA Vol. 4, at 5-16 ("Depending on the terms of specific easement agreements along the [right of way], Longhorn would usually not have any control over activities such as hunting. The control of hunting activities would therefore be the responsibility of the respective landowners along the ROW. At the current time, Longhorn does not plan to include comments regarding hunting in its educational material."). The Federal Defendants' assumption that hunting along the right of way is a "remote or speculative" possibility, however, reminds the Court that the Department of Justice is in fact located in Washington, D.C. Federal Defendants' Reply, at 38 n.13.

below and concludes the Defendants complied with the Settlement Stipulation.

A. Consideration of Alternatives

The Plaintiffs and City contend the EA does not contain a sufficient analysis of alternatives to the proposed project. This argument fails under NEPA, because the law only requires the EA to contain "brief discussions" of the alternatives to the proposed action. *Fritiofson,* 772 F.2d at 1236. The Settlement Stipulation requires the agencies to identify a range of alternatives, including re-routing alternatives that would avoid Austin and various aquifers, consider the alternatives, and explain why the alternatives are selected or eliminated from detailed study. EA Vol. 2, App. 1A, at 27-29. Additionally, the agencies agreed to "evaluate in detail those alternatives that are determined to be reasonable means of mitigating significant environmental impacts." *Id.* at 29.

The Plaintiffs and City argue the agencies did not truly consider the Austin re-route alternative but allowed Longhorn to designate an alternative route that doomed it to fail. The Settlement Stipulation does not prohibit Longhorn from identifying the alternative routes. Longhorn identified a 21-mile alternative route to replace a 12-mile segment of the Pipeline located in highly populated south Austin. EA Vol. 1, at 4-13; Fig. 3-1. The alternative would avoid approximately 2,893 south Austin dwellings, and "potential impacts to human health and safety residing near the Austin Re-Route are much lower than for the proposed pipeline, based on this difference in population density." *Id.* at 7-16.

Despite the current lower population density of the alternative route, the EA notes "much of the areas of south Travis County and northern Hays County near and west of the I-35 corridor are currently subject to heavy development pressures." *Id.* at 7-16, 7-83. Additionally, the alternative would pass over 8.2 miles of hypersensitive karst aquifer, compared to the 3.0 miles of the existing Pipeline. *Id.* at 7-35. The agencies recognized the difficulty of re-routing the Pipeline further south due to the sensitivity of the Edwards Aquifer and the potential impacts on the San Marcos water supply and the endangered Barton Springs salamander. *Id.* at 7-35, 7-42; *see also* 7-50, 7-69. There would be additional environmental impacts from the 22 days it would take to construct the Pipeline. *Id.* at 7-76. These impacts render the Austin re-route alternative less environmentally sound than the current route. *Id.* at 9-50-51. The EA demonstrates the agencies complied with the Settlement Stipulation by identifying an alternative, considering the positive and negative impacts of the alternative, and abandoning the idea because of greater environmental harm.

The agencies also afforded sufficient analysis to the aquifer avoidance alternative. This alternative would veer to the north, just south of Waco, and require construction of 370 miles of new pipe. EA Vol. 1, at 7-8. The alternative pipeline would have less affected population residing along the route than the current Pipeline. *Id.* at 7-17. Only approximately 80 miles of the alternative route would pass over karst aquifers, as opposed to 175 miles of the existing Pipeline. *Id.* at 7-35. The EA describes the protected species and water supplies along the alternative route. *Id.* at 7-43-44, 7-50-52, 7-69. Construction of the new segment

would last approximately 12 to 18 months, and up to 13 new pump stations would also need to be built. *Id.* at 7-77.

After considering and analyzing the aquifer avoidance alternative, the agencies rejected the alternative. Although the alternative would avoid Austin and the sensitive aquifers in this region, the construction would cause short-term impacts on the environment and, unlike the current Pipeline route that is shared with other pipelines, would expose a new population to pipeline risks. *Id.* at 9-48-49. Additionally, the agencies determined "it is unlikely the [alternative] would serve the proposed project's purpose, i.e. allowing Longhorn a means to transport refined petroleum products to the markets in which it hopes to compete. The additional costs of constructing 370 miles of new pipeline, estimated at $300 million, would likely eliminate Longhorn's potential ability to compete in those markets." *Id.* at 3-17. Therefore, the agencies concluded the aquifer avoidance alternative was not "a feasible means of accomplishing fundamental project purposes." *Id.* This conclusion and the analysis leading up to it complied with the Settlement Stipulation.

B. Environmental Justice Concerns

The Settlement Stipulation requires the agencies to consider any environmental justice issues associated with the operation of the Pipeline, including the location of pipe in certain residential areas. EA Vol. 2, App. 1A, at 27. An environmental justice analysis determines whether there are any disproportionately high adverse human health or environmental effects on minority or low-income populations. EA Vol. 1, at 8-1. The Plaintiffs and City contend the

agencies did not adequately consider environmental justice concerns.

The EA devotes an entire chapter to environmental justice concerns. The agencies reviewed the potential impacts of the project, the potential impacts on minority and low-income populations, the potential disproportionately adverse impacts, and the impacts of mitigation measures. *Id.* at 8-3. The agencies concluded "the proposed project would not have any disproportionately high and adverse effects on minority and low-income populations during normal pipeline operation scenarios. Furthermore, there is no evidence of disproportionately high and adverse effects along a majority of the pipeline in the event of a pipeline failure." *Id.* at 8-1. The City contends the agencies did not consider the effects of Longhorn's replacement of nineteen miles of pipe in southwest Austin, an apparent concession to the Fish and Wildlife Service in exchange for a Letter of Concurrence regarding the Pipeline's effects on the Barton Springs salamander, with no attendant provision of new pipe in southeast Austin. However, the agencies did consider the environmental justice impacts of this new pipe and concluded "mitigation measures proposed in the LMP for Travis County provide an acceptable level of protection to minority and low-income populations." *Id.* at 8-27-30. The Court finds the EA's lengthy discussion and analysis of environmental justice concerns satisfies the Settlement Stipulation.

C. Involvement of Austin Fire Department

The Settlement Stipulation requires the agencies to invite the Austin Fire Department to be a cooperating agency, and the City contends the agencies failed to do so.

Therefore, the City argues, any emergency response plan of Longhorn's must be inadequate. However, the record indicates the agencies did invite the Austin Fire Department to participate in the EA process as a cooperating agency on March 26, 1999. Longhorn's Response to Summary Judgment Motions, Ex. 1. Additionally, in May 2002 the Fire Marshal rejected an invitation by Longhorn to participate in emergency response drills. *Id.*, Ex. 2. The Court finds the agencies' invitation to the Austin Fire Department complied with the Settlement Stipulation.

Conclusion

Having reviewed the record, the Court finds the FONSI complies with NEPA because "the agency decision is founded on a reasoned evaluation of the relevant factors." *Utah Shared Access,* 288 F.3d at 1213 (citing *Marsh,* 490 U.S. at 373-74, 109 S.Ct. 1851, 104 L.Ed.2d 377). While the agency could have discussed some factors more carefully, the Plaintiffs and City cannot say the EA fully fails to discuss any relevant factor. *Utah Shared Access,* 288 F.3d at 1213 ("It is true here, as it is in every case, that the agency could have discussed the relevant environmental impacts in greater detail."). The EA in this case was quite lengthy and detailed, and goes far beyond NEPA's requirements for an EA. *Sabine River,* 951 F.2d at 677 ("[T]he EA is a 'concise' document that 'briefly' discusses the relevant issues") (quoting CEQ regulations concerning NEPA). An EIS might result in more "excellent paperwork," but the Court agrees with the agencies that an EIS would provide essentially nothing more to ease the fears of the Plaintiffs and Austin residents. 40 C.F.R. § 1500.1 ("NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action.").

The leftover uncertainties result from the unavailability of data and the simple fact that predictions based on mitigation measures that have not yet been done are necessarily uncertain. What the Plaintiffs and City really want – no gasoline flowing through the Pipeline, certainly not through 52-year-old pipe, through our backyards and over our aquifers – would not be accomplished through an EIS.

While this case is about the Pipeline, it is more essentially about following a process that Congress guaranteed to Americans. As described above, the Court finds the agencies made good on Congress's promise and followed the process. This Court is part of the process too, for the balance of power that is the basic and fundamental process keeping the federal government afloat requires federal courts to defer to Congress's statutory restriction of courts' role in the NEPA process and delegation of authority to administrative agencies. The undersigned personally is extremely concerned Longhorn will begin pushing high-grade gasoline through the Pipeline in less than a month, which it has assured the Court it intends to do. The Court finds no consolation whatsoever in the fact that Longhorn is a limited partnership with limited liability and has only $15 million of liability insurance. Had the Court been granted more discretion, at a very minimum the undersigned would find it reasonable to order Longhorn to replace the 52-year-old pipe in all populated areas and in areas that affect people's drinking water supply. However, the Court has no such discretion and recognizes the importance of staying within the sharp boundaries of judicial review. And while the Plaintiffs and the City are undoubtedly far from excited about the Pipeline's imminent startup, the Court hopes they find some reassurance in Longhorn's "unprecedented" mitigation measures for

the Pipeline, which likely would not have come about but for their fervent and articulate NEPA challenge. The mitigation measures are a product of the effective process. Time will only tell if the mitigation measures will be sufficient to contain the dangers inherent in this decrepit Pipeline, and the people and critters in its threatening shadow can only hope and pray that they will.

And finally, the Court turns to the costs of suit. The Plaintiffs filed this lawsuit seeking the only legal relief available, and that was an investigation of this Pipeline with regard to environmental impacts under NEPA. The Federal Defendants disclaimed any responsibility, and all Defendants contended this Court could not have jurisdiction and there were no lawful procedures available to the Plaintiffs to obtain a NEPA investigation. The Plaintiffs won relief in several ways. First, the government finally admitted its responsibility and selected the DOT's Office of Pipeline Safety as the responsible agency. Plaintiffs then obtained an in-depth investigation of the Pipeline and resulting EA, which took over a year and a half. Plaintiffs also in the process received significant mitigation concessions from Longhorn along with a commitment that the OPS will ensure the completion of those mitigation features and closely monitor this Pipeline that puts in jeopardy thousands of people who live above it and many more thousands of people who depend upon the water it runs through.[8] Of course, the Plaintiffs did not get what they

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[8] The undersigned hears frequently of his many weak personality traits, but memory is not among them. Regardless of the OPS's claim to fame of having only nine employees to monitor all pipelines in the southwest United States, the undersigned will not forget OPS's

(Continued on following page)

really wanted, which was to stop the Pipeline, but that simply wasn't in the cards dealt by the United States Congress. Therefore, all costs will be taxed to the Defendants, as this Court determines the Plaintiffs and City were the prevailing parties, notwithstanding a take nothing judgment.

In accordance with the foregoing:

IT IS ORDERED that the Plaintiffs' Motion for Summary Judgment [# 295] is DENIED;

IT IS FURTHER ORDERED that the City of Austin's Motion for Summary Judgment [# 299] is DENIED;

IT IS FURTHER ORDERED that Defendant Longhorn Pipeline Partners, L.P.'s Motion for Summary Judgment [# 300] is GRANTED;

IT IS FURTHER ORDERED that the Federal Defendants' Motion for Summary Judgment [# 297] is GRANTED;

IT IS FURTHER ORDERED that the Plaintiffs' Motion to Extend the Injunction [# 201] and Request for Preliminary Injunction [# 323] are DENIED;

IT IS FURTHER ORDERED that the City of Austin's Motion to Extend the Injunction [# 203] and Request for Preliminary Injunctive Relief [# 308] are DENIED;

IT IS FURTHER ORDERED that Longhorn's Motion to Strike declarations filed by the City of Austin [# 311] is

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commitment to enforce Longhorn's mitigation measures and monitor *this* Pipeline.

GRANTED in part and DENIED in part, as discussed in Part III above;

IT IS FURTHER ORDERED that Longhorn's Motion to Strike declarations filed by Plaintiffs [# 312] is GRANTED in part and DENIED in part, as discussed in Part III above;

IT IS FURTHER ORDERED that the Federal Defendants' Motion to Strike Plaintiffs' declarations [# 315] is GRANTED in part and DENIED in part, as discussed in Part III above;

IT IS FURTHER ORDERED that Longhorn's Motion to Strike documents filed by City of Austin [# 320] is GRANTED in part and DENIED in part, as discussed in Part III above;

IT IS FURTHER ORDERED that Longhorn's Motion to Strike exhibits filed by Plaintiffs in support of their summary judgment response [# 334] is DENIED;

IT IS FINALLY ORDERED that Plaintiffs' Motion to Strike Declarations of J.P. Sullivan, Jr. [# 337] is GRANTED.

SIGNED this the 19th day of July 2002.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

[LOGO] [LOGO]

**Research and
Special Programs
Administration**

FINDING OF NO SIGNIFICANT IMPACT

NOV 03 2000

To Interested Agencies, Officials, Public Interest Groups, and Individuals:

The Office of Pipeline Safety of the Research and Special Programs Administration of the U.S. Department of Transportation (OPS) and Region 6 of the U.S. Environmental Protection Agency (EPA) have performed an environmental assessment (EA) of a project proposed by Longhorn Partners Pipeline, L.P. (Longhorn). Issuance of this joint finding of no significant impact (FNSI) completes review of the proposal under the National Environmental Policy Act of 1969 (NEPA) and regulations implementing that Act.

OPS possesses statutory responsibility for ensuring the safe transportation of hazardous liquids by pipeline under the Pipeline Safety Law, 49 U.S.C. §60101 *et seq.* To that end, it has promulgated safety standards regulating the design, construction, operation and maintenance of hazardous liquid pipelines, currently codified at 49 C.F.R. Parts 194, 195, and 199. OPS regulations are intended to prevent spills and minimize adverse impacts when they occur. OPS periodically evaluates the operating practices and the physical condition of the pipelines it regulates and may take appropriate enforcement action against operators which fail to comply with applicable regulatory standards. There are important statutory constraints on

OPS regulatory authority, however, including 49 U.S.C. §60104(e), which specifically prohibits it from prescribing pipeline routes. Requiring that an operator reroute its pipeline to avoid potential problems is thus not a regulatory option available to OPS.

OPS has been delegated responsibility for reviewing and approving facility response plans pipeline operators develop under Section 311(j)(5) of the Clean Water Act, 33 U.S.C. §1321(j)(5), as amended by the Oil Pollution Act of 1990. In this case, OPS participated in the NEPA analysis provided for in the settlement agreement and will rely on the mitigated FNSI in deciding whether to approve Longhorn's response plan. The EA underlying this FNSI may also be used by the Department of Defense in determining whether to grant Longhorn a right-of-way across Fort Bliss.

Although it possesses enforcement and cleanup authority over pipeline spills to surface waters, EPA has no direct authority to regulate the construction or operation of pipelines[1] and does not contemplate using the EA on which this FNSI is based in any future regulatory decision it may make. It is participating as a Joint Lead Agency here solely to bring its expertise in environmental issues and the NEPA process to the proposal's review.

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[1] EPA Region 6 has issued a national pollutant discharge elimination system general permit authorizing discharges of storm water from construction projects in Texas, an action exempt from NEPA requirements pursuant to Section 511(c)(1) of the Clean Water Act, 33 U.S.C. §1371(c)(1). Longhorn submitted notices of intent to obtain coverage under that general permit for storm water discharges associated with pipeline construction.

BACKGROUND

In 1949 and 1950, Exxon Pipeline Company (EPC) constructed a pipeline to transport crude oil from Crane to Houston, Texas, a distance of approximately 450 miles. Few records are available reflecting earlier years, but during the last 29 years in which EPC operated the pipeline, it experienced 26 accidental releases. Shortly after idling the pipeline in 1995, EPC sold it to Longhorn, a limited liability partnership formed to transport refined petroleum products (primarily gasoline) from Gulf Coast refineries to El Paso, Texas.[2] To accomplish its purpose, Longhorn commenced construction of an extension of the old EPC pipeline from Crane to El Paso. The mainline portion of the system (Houston to El Paso) consists of 18 and 20-inch diameter pipe and is about 695 miles long. Longhorn also constructed a 28 mile lateral pipeline from Crane to Odessa and proposes to construct three smaller laterals in the El Paso area. The entire system, including pipe in the laterals, is about 731 miles long.

Before Longhorn completed construction of the system, private citizens and the Barton Springs – Edwards Aquifer Conservation District filed an action (*Spiller* v. *Walker*, Civil No. A-90-CA-255-SS (W.D. Tex.)) against Longhorn and various federal agencies, including the Federal Energy Regulatory Commission, Department of

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[2] El Paso is a staging area for pipeline shipments of gasoline further north, west and south and most gasoline currently used in and shipped from El Paso is now refined locally or in New Mexico. Lower Gulf Coast refining costs and use of the existing EPC infrastructure are factors Longhorn hopes will allow successful competition in the El Paso "gateway market" despite greater transport distances.

Defense, OPS, and EPA, alleging Longhorn should not be allowed to use the pipeline until the federal government prepared an environmental impact statement (EIS) under NEPA §102(2)(C), 42 U.S.C. §4332(2)(C). The City of Austin and the Lower Colorado River Authority (LCRA) intervened in that action as plaintiffs.

On August 25, 1998, the Federal District Court for the Western District of Texas issued an order preliminarily enjoining operation of the pipeline and ordering OPS and/or EPA to prepare an EIS. The court found OPS was required to prepare an EIS because its "extensive and intricate oversight and approval of the Longhorn Pipeline's safety and emergency-response plan constitutes major Federal action significantly affecting the quality of the human environment." Slip Opinion at 29. The Court included EPA in the Order even though it found EPA was proposing no regulatory action requiring EIS preparation. Longhorn, OPS and EPA filed notices of appeal, but also entered negotiations with the plaintiffs that culminated in a settlement agreement in March 1999. Under the terms of the settlement agreement, OPS and EPA agreed to prepare, as Lead Agencies, an EA on the proposed pipeline project and, based on the EA, issue a finding of no significant impact or notice of intent to prepare an EIS. Longhorn agreed to fund third-party consulting services for preparation of that EA. The settlement agreement also included detailed scoping and public participation provisions that rendered the EA (and the process under which it was prepared) unusually thorough – more akin to an EIS than a typical EA.

After judicial approval of the settlement stipulation, representatives of the Lead Agencies attended a series of informal public meetings hosted by Longhorn at which

opinions on the project and potential scope of the EA were expressed. The City of Austin hosted a similar meeting attended by over 1,000 individuals. Many commentors opposed the proposed project on the basis of environmental risks associated with accidental releases of product from the pipeline.

Subsequently, the Lead Agencies and their third-party contractor commenced preparation of a draft EA, employing an enhanced[3] version of a relative risk model for pipelines developed by W. Kent Muhlbauer. Entry of pipeline information, historical data, and conservative default values to the model yielded numerical relative probability of failure (POF) scores for each of about 8,000 segments of the pipeline, based on their physical condition and susceptibility to the four general causes of pipeline failure, i.e., corrosion, operator error, design/construction defects, and outside force. Conservative assumptions were consistently employed to ensure that all contingencies were taken into account. This "pre-mitigation" assessment indicated the Longhorn pipeline, if operated as it had been historically, could be expected to experience a slightly higher failure rate than an "average" pipeline.

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[3] The "standard" Muhlbauer relative risk model, as commonly used in the pipeline industry, uses assigned values to represent a pipeline's current condition and the environmental sensitivity of its surroundings. For purposes of the Longhorn project evaluation, Muhlbauer adjusted the model so it would accept actual data obtained from historical operations and testing, rendering its results more accurate when such data were available. He also eliminated input fields associated with consequence factors, sharply focusing the model on failure probability and allowing the Lead Agencies to more comprehensively assess receptor sensitivity using alternative means.

To provide Longhorn direction on mitigation plan development, the Lead Agencies identified and evaluated potential spill receptors along the proposed pipeline route and ranked them as "normal" (Tier 1), "sensitive" (Tier 2), or "hypersensitive" (Tier 3) based on factors such as proximity to population centers, drinking water supplies, and protected species habitat. They then established relative POF "target" scores for each tier in an effort to reduce the chance of a spill or leak in each segment of the line to a degree commensurate with the sensitivity of the area in which it was located. The targets approximated POF scores that would be achieved by new pipe in a benign environment (free of third party activities, highly corrosive soils, etc.) operated under good industry practices (Tier 3), by existing pipe in a benign environment operated under good industry practices (Tier 2), and by a somewhat better than average similar pipeline (Tier 1). Longhorn was requested to develop mitigation measures that would meet those risk reduction goals (as measured by the enhanced Muhlbauer model), paying particular attention to the specific threats to which each pipeline segment was exposed. Scores could be improved by providing new data to overcome default values, undertaking remedial construction, improving proposed operation and maintenance practices, or taking other measures to reduce risks. In response, Longhorn obtained new data through testing and inspection and developed a mitigation proposal which reduced relative POF to a level better than each assigned target.

When completed, the draft EA consisted of three volumes (including appendices) and was about 1200 pages in length. Among other things, it evaluated various alternatives to the proposed project, identifying the "no action"

alternative as resumption of crude oil service in the former EPC portion of the pipeline between Crane and Houston and concluding that the mitigated gasoline pipeline would present less risk to the environment than such a resumption of crude oil service. One volume consisted of aerial depictions of the entire pipeline route, annotated to show the mitigation measures, tier designations, and relative POF scores that applied to each segment, providing the public a detailed look at proposals potentially affecting specific areas in which they were interested, e.g., neighborhoods and particular environmental amenities.

In response to a request for comments on the Draft EA, the Lead Agencies received over 6,000 written comments. Although many of those comments were form letters and postcards opposing the project on general grounds, other raised specific issues. In addition, comments were submitted at public meetings the Lead Agencies held in Houston, Austin, Fredericksburg, Bastrop, and El Paso, Texas. Most participants at the Houston and El Paso meetings supported the project, but those in Austin, Fredericksburg, and Bastrop were generally opposed to it and critical of the draft EA. Many were concerned about exposure of human resources, e.g., schools, homes, and health care facilities, to the potential effects of a product spill. Others expressed concerns on potential damage to natural resources, e.g., endangered species habitat and surface and subsurface water quality.

Consideration of comments resulted in a number of changes to the EA, including:

- Evaluating a different "no action" alternative in the final EA, i.e., non-use of the pipeline. The final EA also evaluates a modified form of the former "no action" alternative under which

Longhorn would transport crude oil from El Paso and Odessa to Houston, the most likely use of the pipeline should Longhorn be unable to transport gasoline.

- Identifying wetlands. The final EA identifies wetlands that occur along the pipeline route and evaluates the potential effects spills might have on them.

- Adjusting tier assignment. The final EA's assignment of receptor sensitivity to portions of the pipeline route includes additional Tier 2 areas based on information commentors provided on specific resources.

- Completing studies. Studies Longhorn earlier offered to conduct as mitigation efforts are complete and summarized in an appendix to the final EA, providing a better basis for evaluation of some risks. One of those studies, which analyzes valve placement in the Pedernales River basin, supports installation of additional check valves to limit the amount of product which could exit the pipeline in a spill. Others, e.g., a scour study, recommend specific remedial actions and additional ongoing inspections. Longhorn's mitigation plan includes corresponding changes, i.e., proposals to install the additional valves and implement the recommendations of the completed studies.

- Performing additional modeling. Modeling of potential spills from line ruptures in the Pedernales River basin shows it infeasible to eliminate potential threats to Austin's drinking water supply if MTBE was in the spilled product. Longhorn's mitigation plan now prohibits use of the

line for transport of petroleum products containing MTBE.

- Assessing residual risk. In the final EA, the Lead Agencies' relative POF assessment is supplemented with professional analysis and estimates of residual risk, i.e., the degree of risk remaining after mitigation.

The final EA also incorporates the final version of Longhorn's mitigation plan[4] and an updated relative POF assessment reflecting changes to the plan. Some changes are only clarifications, but others are substantive revisions Longhorn proposes in response to concerns raised by the Lead Agencies, other interested parties, and/or public comment. Two mitigation measures many commentors felt appropriate are not included in Longhorn's mitigation plan, however.

The first of those measures is the "aquifer avoidance" route alternative. That alternative, originally developed by the Bureau of Land Management in connection with a 1987 supplemental EIS on the All American Pipeline project, largely avoids crossing the karst Edwards and Edwards-Trinity aquifers and minimizes potential spill/leak exposure of others. It also minimizes exposure of population centers. Constructing a pipeline along this alternative route would also result in adverse environmental impacts from construction activities and would expose new areas and populations to risks associated with pipeline failures. To follow that route, Longhorn would

[4] Longhorn submitted 21 distinct versions of its mitigation plan (and a supplement to its last version) during the environmental review process.

have to abandon much of the former EPC pipeline and construct around 319 miles of new pipeline, increasing the estimated "pre-mitigation" $399 million capital costs of its project by $299 million.

The second suggested measure Longhorn has not adopted is replacement of all pipe in the former EPC pipeline, which is now over fifty years old. Most of the pipe in that portion of Longhorn's system was manufactured using low frequency electronic resistance welding (ERW), a process considered state-of-art at the time, but which has since been linked to instances of longitudinal seam failure.[5] Studies performed in the late 1980s recommend increased vigilance where low frequency ERW pipe is used and the relative risk model the Lead Agencies employed "penalizes" such pipe due to its increased susceptibility to certain failure mechanisms. Although Longhorn's mitigation plan was specifically crafted to address those mechanisms, some commentors asserted that replacement of the low frequency ERW pipe in the Houston to Crane portion of the pipeline was a necessary measure to reduce the risk of spills/leaks. Replacement of pipe in that portion of the line would reduce its POF,[6] but would require 450 miles of new

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[5] As of the late 1980s, 41% (46,000 miles) of all interstate pipelines in the U.S. were constructed of low frequency ERW pipe.

[6] That POF reduction would be only marginally attributable to potential differences in pipe manufacture. New installation involves new coatings, post-installation pressure testing, modern construction techniques, and other factors that reduce uncertainty and relative POF scores *vis a vis* an existing pipeline that has been unexamined in many years or on which construction and maintenance records are incomplete.

construction with a corresponding project capital cost increase.

Late in the EA preparation process, the Lead Agencies sought advice from the President's Council on Environmental Quality (CEQ)[7] before making a decision on whether to issue a FNSI or notice of intent to prepare an EIS on the project. After reviewing a working draft of the Final EA, CEQ's Chairman recommended they issue a FNSI, opining that the EA process had reduced the project's environmental risks to a minimum, that remaining risks were not significant, and that NEPA's purposes and policies would be well served by issuance of a FNSI in this matter.

Issuance of today's FNSI completes NEPA review of the proposed project. Pursuant to the terms of the settlement agreement, Longhorn may not transport petroleum products in the pipeline for at least 30 days. In addition, Longhorn must complete certain mitigation measures prior to start-up.

ANALYSIS

There are no fixed standards in NEPA or CEQ's implementing regulations for deciding whether a proposed

[7] CEQ is the chief policy arm of the federal executive branch on NEPA's application. Its regulations are binding on all federal agencies engaged in NEPA review and, under appropriate circumstances, CEQ may recommend that the President of the United States direct a federal agency to change its position on a proposal. A CEQ recommendation is thus entitled to substantial deference from agencies engaged in NEPA review.

project's impacts are significant so as to require preparation of an EIS. 40 C.F.R. §1508.27 requires that agencies consider a proposed project's "context" and "intensity" in assessing significance, and leaves it to the Lead Agencies best professional judgment to determine whether impacts are significant. Routine pipeline operations pose few environmental problems, but unintentional spills and leaks are generally capable of causing substantial harm. Although no federal agency proposes to authorize such accidental releases, the EA is thus largely devoted to examining risks posed by potential spills and leaks from the Longhorn pipeline, taking a hard look at their potential causes, effects, means of avoiding them, and means of minimizing environmental harm should they occur. The Lead Agencies focused their significance analysis on the risk that such unintended releases pose to the environment, closely examining (1) the probability of releases and (2) the degree of environmental harm which could result from a release. Even potentially catastrophic consequences may not be significant if they have a very low probability of occurrence. Nor are common occurrences significant if they cause little or no harm.

The Lead Agencies and their multi-disciplinary consulting team evaluated failure probabilities and potential consequences from several distinct, but interrelated, perspectives. First, they applied their judgment to determine whether Longhorn's mitigation plan effectively and comprehensively addresses the four causes of pipeline failure and minimizes the possible consequences of failure. Second, they assessed residual risks both qualitatively and quantitatively. Based on these approaches the Lead Agencies now find the project has no significant environmental impact warranting EIS preparation. Moreover, the

purposes and goals of NEPA are well served by issuance of a FNSI in this case.

Measures to Address Risk

The EA in this matter is far more than a generic look which might apply to any pipeline. Use of the enhanced Muhlbauer relative risk model provided a hard look at the Longhorn pipeline's specific susceptibility to the four causes of pipeline failure over its entire length and the tiering effort with which the Lead Agencies assigned risk reduction "targets" ensured Longhorn would propose mitigation measures suited to the vulnerabilities of specific areas. As a direct result of that process, Longhorn's final mitigation plan contains 40 specific mitigation measures (and unnumbered operations and maintenance practices), some of which it has already implemented. They are an overlapping mix of physical modifications to the pipeline and operational controls tailored to the environmental sensitivity of receptors along the pipeline's entire route which reduce spill/leak risks to a minimum by comprehensively and redundantly addressing each of the four potential causes of pipeline failure along its entire route. Measures designed to avoid spills/leads include:

- Increased patrol frequency and monitoring along the pipeline route,
- Extensive public information and education commitments to reduce or eliminate potential damage from third-party excavation,
- Enhanced corrosion control activities,
- New and stronger pipe, additional burial depths, and concrete caps where the pipeline crosses the Barton Springs recharge and contributing zones,

- Additional burial depth and/or protective barriers (caps) in other selected areas of sensitivity,
- Periodic integrity verifications including hydrostatic testing and in line inspections focusing on low frequency ERW pipe failure susceptibilities at conservative frequencies established in accordance with an approved Operational Reliability Assessment,
- Surge pressure limitations more stringent than normally applied in the industry,
- Performance of detailed studies on certain rare pipeline failure mechanisms and a commitment to comply with the recommendations, if any, of those studies, and
- Annual reviews and audits of the pipeline operation with publication of findings on Longhorn's website.

Given unforeseeable future events, limitations on technology, and the vagaries of human behavior, no pipeline of substantial length can be rendered completely free of failure risks, however, and Longhorn's mitigation and response plans thus also contain provisions to minimize harm should a failure occur. Response measures of the plan include:

- Enhanced leak detection capabilities,
- Enhanced emergency planning efforts,
- Spill response centers located to minimize response time (LaPorte, Houston, Austin, San Antonio, Midland/Odessa, and El Paso),
- No transport of products containing MTBE (a gasoline additive that is highly soluble and

difficult to remove from water) in other than trace amounts,

- Installation of additional check and block valves in the Pedernales River basin (a regional water supply) to limit the quantity of product which could be released from a pipeline rupture,
- Pipeline shut down when flow in the Pedernales River is at 100,000 cubic feet per second or higher, and
- Secondary containment where the pipeline crosses the Barton Springs recharge and contributing zones.

Longhorn's mitigation plan also contains measures to ensure the pipeline retains its integrity as it is exposed to operational stress and changing conditions. Consistent with the relative risk assessment approach the Lead Agencies employed in evaluating Longhorn's proposal, the plan includes measures specifically designed to fully address potential failure mechanisms related to pipe age, including measures addressing mechanisms associated with the low frequency ERW pipe in the former EPC portion of the system. Future conditions that may threaten pipe integrity will be monitored and pipe will be repaired or replaced as appropriate throughout the life of the proposed project in accordance with a system integrity plan (SIP), which is designed to identify, assess, and manage factors, including pipe condition, that could lead to a future release.

Like the Lead Agencies' relative risk assessment, the SIP focuses on the four causes of pipeline failure (corrosion, operator error, design/construction defects, and outside force and assigns priorities consistent with the sensitivity

of local receptors, e.g., population density, drinking water supplies, and recreational areas. An important feature of the SIP is an operational reliability assessment (ORA) Longhorn will perform at least yearly to provide a technical assessment of the SIP's effectiveness. Events that could lead to adjustments in ORA frequency include new inspection or test data affecting previous estimates, a significant change in pipeline operation, a pipeline accident, a significant industry or government advisory regarding pipeline integrity, or new or enhanced technologies that could produce significant reductions in pipeline risk. To identify potential problems and establish the frequency of integrity re-verification through in line inspection (ILI), the ORA uses the results of previous integrity verifications, conservatively applied crack-growth and corrosion-rate calculations, information on changes in operations, environmental changes along the pipeline route, root cause analysis results, and other relevant information. The ORA focuses substantially on low frequency ERW pipe failure mechanisms through continuous monitoring of pressure cycles and application of advanced fatigue and fracture mechanics calculations.

As part of the ORA, Longhorn will run several types of ILI tools with overlapping capabilities on the EPC portion of the system. Within 3 months of start-up, Longhorn will run a high resolution magnetic flux leakage (MFL) tool (effective in detecting and characterizing corrosion and outside force damage) on the former EPC portion of the system. Within three years of startup, or sooner if indicated by the ORA, Longhorn will run a transverse field magnetic flux tool (effective in detecting cracks not readily detectable with the MFL tool, especially in the ERW longitudinal weld seam). Within five years of startup, or

sooner if indicated by the ORA, Longhorn will run an ultrasonic wall measurement tool (effective in detecting laminations, wall loss, and material defects). Thereafter, Longhorn will run "smart geometry" tools (or an equivalent or superior tool) at least every three years throughout the life of the project. The ORA will determine which tool should be used in these subsequent runs and may require more frequent runs. Collectively, this ILI protocol will obtain sufficient data to enable Longhorn to replace or repair pipe in time to avoid failures due to any pipe condition that develops over time.[8]

The SIP assures that Longhorn will continue mitigation efforts throughout the life of its project and that those efforts will be rationally directed to future risks, but it is not immutable. To enable Longhorn sufficient flexibility to upgrade the safety of its pipeline, the SIP and other features of the operations and maintenance manual in which its mitigation measures are codified for enforcement purposes may be modified in the future. In contrast to normal practice, however, Longhorn must obtain OPS approval prior to such amendment and must provide notice to the public (*via* website posting) and to the cities of Houston, Austin and El Paso as well as LCRA if and when it seeks OPS approval. This unusual procedure will

[8] ILI cannot be performed and operational pressure data cannot be obtained until the pipeline is in operation. Accordingly, the ORA will use estimated values for the first few months of pipeline operation. Recent hydrostatic testing and repairs ensure pipeline integrity during this initial period as does a Longhorn commitment to restrict operating pressures to 88% of the maximum pressure for which the line is designed.

afford OPS opportunity to consider the views of interested entities prior to acting on amendment requests.

The combination of mitigation measures Longhorn now proffers greatly exceeds common practice in the pipeline industry and is without precedent in the experience of OPS and the pipeline experts on the Lead Agencies' consulting team. The efficacy of those measures and the thoroughness with which they address the four causes of pipeline failure is amply supported by industry experience and is reflected by post-mitigation POF scores. If implemented, they should render Longhorn's pipeline among the safest in the nation and dramatically safer than the minimum regulatory threshold established by OPS regulations.

Residual Risk

The issue for decision is whether risks have been mitigated below the level of significance. In the final analysis, this is a qualitative decision which can only be rendered through the application of the best professional judgment of the Lead Agencies and their multi-disciplinary contract support team. Based on their engineering analysis of the probability of failure and their interdisciplinary analyses of the consequences of any future spill, they concluded that the residual risk of environmental harm from the pipeline as mitigated is not significant and does not warrant preparation of an EIS.

The Lead Agencies have also developed rough and conservative numerical estimates of residual risk probabilities and published them in Appendix 9B to the Final EA. Standard failure probability curves commonly applied to engineered systems suggest these residual risk estimates

are conservative and spill occurrence records moreover suggest the very low spill frequencies predicted for the mitigated Longhorn system are achievable and have in fact been achieved by pipelines of similar length operated under less rigorous protocols.

The Lead Agencies estimate there will be about two or three product spills[9] over the projected fifty year life of the mitigated pipeline, only one of which will exceed the "reportable quantity" of 50 barrels. The EA's analysis of estimated impacts that spills may pose to various environmental amenities need not be repeated here, but a brief summary of several on which the public expressed substantial concern is warranted.

Surface Water Contamination. The pipeline crosses numerous rivers and streams (and associated wetlands) in ten major river basins. In addition, there are 857 palustrine wetlands in close enough proximity to be potentially affected by a nearby spill. Many of these surface waters provide valuable habitat for aquatic and aquatic-dependent life and significant opportunities for recreational use. Potential contamination of such a surface water is by far the greatest residual risk the mitigated pipeline poses. The Lead Agencies estimate there is about an 8% chance (as compared to over 90% without mitigation) that a spill from the Longhorn pipeline will at least once contaminate a recreational stream and about a 5% chance (16% without mitigation) it will contaminate a wetland.

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[9] This spill frequency estimate does not include minor leaks at pump and valve stations. Such leaks are generally small, confined to the facility site, quickly discovered, and soon remedied.

These are overall risk estimates that apply to the whole length of the pipeline; the chances that a specific river or stream near any given 2500 foot segment of the pipeline will be contaminated is an estimated 0.006% and that a specific wetland in proximity to such a segment will be contaminated an estimated 0.005%.

For analytical purposes, "contamination" means sufficient product would reach a surface water to cause a visible sheen on its surface, but the actual extent of contamination would largely depend on the amount of product reaching the water, flow conditions at the time of the release, and effectiveness of response efforts. The effects of smaller spills or a large spill to a stream with little or no flow at the time of release would generally be confined to a limited reach near the point at which the product entered it, but a larger spill to a river with higher flow could affect aquatic life and recreational uses several miles downstream. Given the volatile nature of gasoline and an adequate response action, however, even a fairly large spill of product would be unlikely to cause long-term environmental harm.

Drinking Water Contamination. Many commentors on the draft EA expressed concern over potential contamination of public drinking water supplies. The chance that such a drinking water supply, either surface or subsurface, will be contaminated by a spill from the pipeline over the life of the project is extremely low, estimated at about 0.3% (over 20% without mitigation). Moreover, Longhorn has committed to ground water remediation and/or providing an alternate drinking water supply should its pipeline operations contaminate a private or public well and has obtained $15 million of insurance for that purpose.

Even with insurance, Longhorn's resources might well prove inadequate should a spill from the pipeline substantially contaminate Lake Travis, the drinking water supply for the City of Austin and smaller communities such as Lago Vista and Lakeway.[10] Longhorn will thus limit the amount of product which could be released to waters in the Pedernales River basin through installation of strategically placed valves. Except in exceptional flood events, gasoline from a "worst case" spill would volatilize before it reached Lake Travis. To guard against mishaps during those rare flood events, Longhorn will shut its pipeline down whenever flow in the Pedernales is 100,000 cubic feet per second or greater. The estimated probability for contaminating any Lake Travis water supply is 0.02% and much lower for contaminating Austin's drinking water.

Barton Springs Contamination. Numerous commentors expressed concern over the potential effects of spills and leaks in the Barton Springs recharge and contributing zone, an area which is unusually sensitive to contamination and on which the fate of the endangered Barton Springs salamander depends. One commentor at the Austin public meeting even submitted a rock from his backyard for the record, providing graphic evidence of the highly porous nature of the limestone in the recharge zone (which could enable rapid transport of a spill through this portion of the Edwards Aquifer, rendering

[10] Longhorn engaged in extensive discussions and negotiation with LCRA on mitigation in the Pedernales River watershed, an effort the Lead Agencies and their contractor supported with objective modeling efforts and technical advice. Although those negotiation ended in impasse, Longhorn's mitigation plan nevertheless includes some features suggested by its discussions with LCRA.

effective response and remediation efforts difficult). As an outgrowth of consultation with the U.S. Fish & Wildlife Service, Longhorn now proposes very extensive mitigation for pipeline traversing the Barton Springs recharge and contributing zones (approximately 18 miles). It includes installation of higher strength pipe, installation of a concrete cap above the pipeline, installation of an 8 miles subsurface hydrocarbon sensing cable, and a sealed trench design providing secondary containment of potential spills or leaks. Given that extraordinary commitment, the chance of a release which might contaminate the aquifer is an estimated 0.02%.

Death or Injury. Another frequently expressed public concern is the risk of personal or injury or death associated with a flash fire (frequently, but generally incorrectly, termed an "explosion") fueled by a ruptured pipeline. Fires are associated with only 6% of gasoline pipeline spills and the mitigated pipeline poses an estimated chance of only 0.5% (13.1% without mitigation) that one or more deaths (including deaths of pipeline workers and response team members) will occur in connection with a release over the 50 year project life. At an estimated 2.3% (46.9% without mitigation), the risk of injury is somewhat higher.

The risk of death or injury to any specific individual, home, school, health care facility, or other sensitive human resource along the pipeline route is much lower. There is only an estimated 0.00036% (less than 1 in 250,000) chance that one or more deaths will occur in any given 2500-foot segment of the pipeline and the chance that it will occur in a specific location that would lethally affect some specific resource is presumably smaller.

Area Risk. These numerical estimates do not reflect incidental reductions in risks that other pipelines pose to the same environmental amenities. The Longhorn pipeline is located in a corridor it shares with 14 other hazardous liquids pipelines in the Houston area and two others closely parallel most of its remaining route. The Longhorn pipeline will thus pose only incremental spill/leak risks along its route, but some of its mitigation measures will likely reduce the risk of releases and consequential damage from the other pipelines. The public education efforts Longhorn will undertake to avoid third party damage, for instance, should also reduce the risk of third party damage to other nearby pipelines. Similarly, frequent patrols of the Longhorn right of way may reasonably be expected to result in detection of third party activity which might damage those other pipelines and result in earlier detection of leaks or spills from those other pipelines.

This incidental risk reduction is qualitative as well as quantitative because those other pipelines carry products other than gasoline (crude oil and natural gas liquids) and the environmental risks they pose thus differ from risks associated with the Longhorn pipeline. If Longhorn's efforts result in avoidance of third party damage to the adjacent crude oil pipeline, the resulting reduction in the risk of long term surface water contamination might even be greater than the residual risk Longhorn's own highly mitigated gasoline pipeline poses to the same resource. From the standpoint of potential death or injury to people, this area risk reduction may be particularly important in the case of adjacent pipelines carrying commodities more flammable than gasoline, i.e. natural gas liquids and, in the Houston area, propane. The Lead Agencies have not

assessed specific risks posed by adjacent pipelines quantitatively. It is nevertheless reasonable to conclude that risks associated with those other pipelines will in fact be diminished by operation of Longhorn's pipeline, offsetting its residual risk to some degree and possibly negating it altogether.

Environmental Justice. The Lead Agencies performed an Environmental Justice analysis under Presidential Executive Order 12898 and its accompanying presidential memorandum. A major focus of the analysis was whether the risks of the pipeline would have a disproportionately high and adverse effect on minority or low-income populations. Ultimately, this evaluation addressed both whether the proposed project poses risks to the minority or low-income populations that are disproportionately high and whether the risks to minority or low-income populations are adverse. Because the risks to minority or low-income populations are not significant (as employed by NEPA) and do not appreciably exceed the risks to other populations, for these two reasons, there are no disproportionately high and adverse risks.

The Lead Agencies focused their analysis on two populations of potential environmental justice concern, those in Harris County and those in Travis County. The Lead Agencies' pre-mitigation relative risk assessment indicated the pipeline had a greater POF in a one low income and minority community in Harris County than in wealthier non-minority communities in Harris County. That disparate risk was partly attributable to historical deficiencies in EPC's maintenance activities in the low income and minority community and partly to a higher population density (resulting in a greater POF due to outside force) in that community. Longhorn's mitigation plan eliminates

that disparity and, in fact, the pipeline in that area now has a lower POF (and a higher relative risk score) than in non-minority areas in Harris County.

As a result of mitigation measures Longhorn proposes to protect Barton Springs and its endangered salamanders, however, potential environmental justice concerns arise in Travis County. The extraordinary measures Longhorn developed during consultation with the U.S. Fish and Wildlife Service reduce relative POF in the recharge and contributing zones so much that it creates a relative disparity between the POF residents of that area face and the POF faced by low income and minority residents living near an adjacent portion of the pipeline. However, the level of risk faced by these low-income and minority residents is not appreciably different from the level of risk faced by the average populated segment of the pipeline. Thus, the population of potential environmental justice concern in Travis County turns out to receive a level of protection comparable to the higher income, non-minority populations in Harris County and elsewhere along the pipeline. Taking all available information into account, these is no disproportionate impact here. Moreover, the estimated probability of a pipeline failure in that low income/minority area during the 50-year project life is still very low and not significant.

In sum, the residual environmental risks of Longhorn's mitigated proposal will have no significant impacts. They are not only minimal in an absolute sense, but are far lower than risks normally associated with operation of similar pipelines and far lower than similar risks much of the same environment faced over the fifty years EPC operated the Houston to Crane segment. They add no large incremental risk to the overall risks of pipeline

failure along most of the pipeline's route and Longhorn's mitigation measures may even substantially reduce some pre-existing risks.

NEPA's Goals and Purposes

NEPA's goals and purposes provide further support for finding the minimal residual risks associated with Longhorn's proposal do not merit preparation of an EIS. NEPA §102(2)(C) requires preparation of an EIS on federal actions which "significantly affect the quality of the human environment," a process which can take several years to complete. After a public scoping process to identify issues for analysis in the EIS, the action agency generally prepares a draft EIS and circulates it to the public as well as to potentially interested federal, state, and local agencies for written comment. Frequently, one or more public hearings are also conducted to obtain comments from the public. Following consideration of comments, the action agency circulates a final EIS responding to substantive comments and prepares a Record of Decision (ROD) explaining how it resolved issues and balanced environmental effects, the agency's mission, and other relevant factors. Among other things, a ROD must "state whether all practicable means to avoid or reduce environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. §1505.2(c). Although action agencies using the EIS process must thus consider mitigation measures, neither NEPA nor implementing federal regulations require that such measures be adopted, even if significant adverse environmental effects are likely. Moreover, an agency's authority to require mitigation is generally limited by the scope of its organic statutory authority, a constraint

which sometimes renders it impracticable to avoid environmental harm. Faced with such choices, action agencies sometimes proceed with projects that are likely to have significant adverse effects after completing the EIS process.

EA review is normally a shorter NEPA process. An EA must take a "hard look" at the potential effects of an action so the action agency may decide whether they are "significant" and thus warrant an EIS. A brief (generally 10 to 15 pages) EA and FNSI are prepared and circulated for comment by other federal, state, and local agencies with regulatory authority over or expertise in the action at issue and/or its effects. Public participation, if any, is sometimes limited to receipt of written comments from individuals on a project mailing list. In contrast to an EIS, an EA provides an action agency no record basis for accepting "significant" environmental effects.

To avoid the time and effort associated with EIS preparation, federal agencies and the project proponents they regulate have over time developed a "mitigated FNSI" concept. In CEQ, "The National Environmental Policy Act – A Study of Its Effectiveness After Twenty-five Years," pp. 19-20 (January 1997), CEQ described the potential benefits and detriments of reliance on that concept:

> [A] . . . significant trend is that of agencies increasingly identifying and proposing measures to mitigate adverse effects of proposed actions during the preparation of EAs. While preparing EAs, agencies often discover impacts that are "significant," which would require preparation of an EIS. Agencies may then propose measures to mitigate those environmental effects. If an agency finds that such mitigation will prevent a

> project from having significant impacts on the environment, the agency can then conclude the NEPA process by issuing a FONSI, rather than preparing an EIS. The result is a "mitigated FONSI." The 1992 CEQ survey and informal opinions of U.S. EPA officials responsible for reviewing NEPA analyses indicate an increase in the number of mitigated FONSIs.
>
> While mitigated FONSIs are a good way to integrate NEPA into planning, some Study participants felt that not all EAs resulting in mitigated FONSIs are meeting the spirit and intent of NEPA. When the EIS process is viewed as merely a compliance requirement rather than a tool to improve decision-making, mitigated FONSIs may be used simply to prevent the time and expense of the more in-depth analysis required by an EIS. The result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives, all of which are at the very core of NEPA's strengths. Moreover, not all agencies that commit to mitigation monitor to determine whether the mitigation was actually implemented or whether it was effective.

An environment benefit associated with "mitigated FNSIs" is the degree of mitigation they encourage in licensing and approval situations. To avoid the expense and delay associated with EISs, applicants may often voluntarily proffer more mitigation than an action agency would or could require after preparation and consideration of an EIS, even though an action agency cannot directly compel an applicant to adopt mitigation in the EA process. The action agency may generally enforce the mitigation commitment because the commitment has been incorporated

in some otherwise enforceable document or because the agency determines that the failure to adhere to the mitigation commitment is a basis for exercising its authority to revoke or suspend its license or approval.[11]

The benefits of mitigated FNSIs are present here with none of the drawbacks CEQ noted in its 1997 report. In the unique circumstances underlying the Longhorn EA process, preparation of an EIS would be unlikely to yield appreciable benefits or provide additional useful information for OPS to consider in reviewing Longhorn's spill response plan. The EA is atypical in that it mimics an EIS in form, content, and preparation process. The scientific rigor and conservatism with which it analyzes the risks of a proposed pipeline operation is, in the opinion of the Lead Agencies, unprecedented in NEPA review. An EIS would take no harder look at the potential consequences of spills or leaks from Longhorn's proposal. Nor is it likely the EIS process would result in discovery and consideration of additional reasonable alternatives or in more robust public participation.

Furthermore, EIS preparation would be unlikely to result in a safer pipeline. The mitigation measures Longhorn will implement if a FNSI is issued will minimize the potential risks of its project to an insignificant level. Because of its

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[11] Both mechanisms are available here because Longhorn has incorporated mitigation commitments in its Operations and Maintenance Manual, a document OPS may enforce pursuant to 49 C.F.R. §195.401(a). Interested citizens may also have enforcement rights pursuant to 49 U.S.C. §60121. Also, OPS may exercise its authority to require changes to the response plan as a condition of its continued approval pursuant to 49 C.F.R. Part 194.

thorough nature and the process under which it was prepared, the Longhorn EA has resulted in greater mitigation than would likely result from the EIS process. "NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action." 40 C.F.R. §1500.1(c). Here, that purpose is best served by issuance of this FNSI.

DECISION

OPS approval of the Spill Response Plan submitted by Longhorn Partners Pipeline, L.P. will not significantly affect the quality of the human environment. Accordingly, no EIS need be prepared on that action.

/s/ Gregg A. Cooke
Gregg A. Cooke
Regional Administrator
EPA Region 6

/s/ Kelley S. Coyner
Kelley S. Coyner
Administrator
Research and Special Programs Administration

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50956

ETHEL SPILLER; ET AL

Plaintiffs

MARIAN COLLINS; BARTON SPRINGS/EDWARDS AQUIFER CONSERVATION DISTRICT; DAVID ROBERTSON;

Plaintiffs – Appellants

CITY OF AUSTIN

Intervenor Plaintiff – Appellant

v.

THOMAS E WHITE, Etc; ET AL

Defendants

THOMAS E WHITE, in his official capacity as Acting Secretary of the Department of the Army; NORMAN Y MINETA, SECRETARY, DEPARTMENT OF TRANSPORTATION; CHRISTINE T WHITMAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES OF AMERICA;

Defendants – Appellees

LONGHORN PARTNERS PIPELINE LP

Defendant – Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING

(Filed Jan. 12, 2004)

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
/s/ E. Grady Jolly
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ETHEL SPILLER,[1] MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, DAVID ROBERTSON,

Plaintiffs,

CITY OF AUSTIN,

Plaintiff-Intervenor

-vs-

ROBERT M. WALKER, in his official capacity as Acting Secretary of the Department of the Army, et al., RODNEY SLATER, in his official capacity as Secretary of Transportation, CAROL A. BROWNER, in her official capacity as Administrator of the Environmental Protection Agency, UNITED STATES OF AMERICA, and LONGHORN PARTNERS PIPELINE, L.P.,

Defendants

Case No.
A-98-CA-255-SS

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[1] Although Ethel Spiller has withdrawn as the plaintiff in this case, her name is listed in the caption to avoid confusion.

SECOND AMENDED JUDGMENT

(Filed Aug. 15, 2002)

BE IT REMEMBERED on the 19th day of July 2002 the Court entered its order granting Defendant Longhorn Pipeline Partners, L.P. and the Federal Defendants' Motions for Summary Judgment and thereafter enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiffs Marian Collins, David Robertson and the Barton Springs – Edwards Aquifer Conservation District and Plaintiff-Intervenor City of Austin TAKE NOTHING from the Defendants Robert M. Walker, in his official capacity as Acting Secretary of the Department of the Army; Rodney Slater, in his official capacity as Secretary of Transportation; Carol A. Browner, in her official capacity as Administrator of the Environmental Protection Agency; the United States of America; and Longhorn Partners Pipeline, L.P., and that the Defendants go hence without delay. All costs shall be taxed to the Defendants, for which execution shall issue;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Longhorn Partners Pipeline, L.P.'s causes of action against Defendants City of Austin; Jesus Garza, in his official capacity as City Manager of Austin; and Charles Lesniak, in his official capacity as Senior Environmental Compliance Officer of Austin, originally filed in Civil Action No. A-02-CA-001-SS and consolidated with this action by Order dated January 11, 2002, are DISMISSED WITHOUT PREJUDICE to refiling. Each party shall bear its own costs.

SIGNED this the 15th day of August 2002.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ETHEL SPILLER, JOHN MOLESWORTH, LUCIEN COLLINS, MARIAN COLLINS, ROB ROY SPILLER, BARBARA SPILLER, HUGH SPILLER, and MARY SPILLER,	§	
Plaintiffs	§	
VS.	§	**NO. A 98 CA 255 SS**
ROBERT M. WALKER, FEDERAL ENERGY REGULATORY COMMISSION, RODNEY SLATER, CAROL BROWNER, UNITED STATES, LONGHORN PARTNERS PIPELINE, L.P., and EXXON PIPELINE COMPANY,	§	
Defendants.	§	

ORDER

BE IT REMEMBERED that on the 25th day of August 1998, the Court reviewed the file in the above-styled cause, particularly the applications for preliminary injunction and the motions to dismiss.[1] The Court has held

[1] Before the Court are the plaintiffs' First Amended Complaint and Application for Preliminary Injunction [#12] and the federal defendants' answer thereto [#22]; and the motions to dismiss filed by Rodney Slater [#13-2], the Federal Energy Regulatory Commission [#43], and Longhorn Partners Pipeline, L.P. [#28], and the plaintiffs' responses thereto [#30, #35, and #51, respectively]. The intervenor the City of Austin has

(Continued on following page)

hearings in this case on April 30, 1998 and July 30, 1998[2] and made various rulings, as memorialized in prior orders. The Court has carried the applications for preliminary injunction to this point. The Court has granted the Federal Energy Regulatory Commission's ("FERC") motion to dismiss, but it has carried all other motions to dismiss.

This is a case in which a partnership of several oil companies and four government agencies take the position that there is no "major Federal action" involved in the federal regulation of the transport of refined gasoline over 700 miles through Texas cities, farms, and ranches through a forty-eight year old pipe with a past history of leaks when carrying unrefined crude oil. Worse, each federal agency refuses to take responsibility for conducting an environmental impact statement or even a less onerous environmental assessment to analyze the environmental dangers involved in such a pipeline and apparently prefers to allow the pipeline to run without any overall evaluation of the effect such a pipeline could have on the human environment. In accordance with the following opinion, the Court now grants the motions for preliminary injunction and enjoins the transportation of refined petroleum products in the Longhorn Pipeline and orders the federal agencies to complete an Environmental Impact Statement on the pipeline project at issue in this case.

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also filed a Complaint and Application for Preliminary Injunction [#55], which is substantially similar to the plaintiffs' First Amended Complaint and Application for Preliminary Injunction and seeks the same remedies.

[2] For citation purposes, the April 30, 1998 hearing will be referred to as "Hearing I," and the July 30, 1998 hearing will be referred to as "Hearing II."

I. Background

The plaintiffs have filed suit for injunctive relief to enforce the National Environmental Policy Act ("NEPA"). Specifically,

> [t]he plaintiffs seek to have the federal government perform a full-fledged review, as required by [the NEPA], of the environmental consequences of federal action that would allow a 48year-old pipeline *originally* built to carry crude oil from Crane in West Texas to Baytown to be converted to a gasoline pipeline carrying as much as 250,000 barrels a day across [various aquifers] and other environmentally-sensitive areas, then patched onto a new segment to complete the transportation of the gasoline products from Crane to El Paso and points further west to Albuquerque, New Mexico, and Phoenix, Arizona [and possibly Mexico].

First Amended Complaint and Application for Preliminary Injunction [#12] at 2. The individual plaintiffs in the First Amended Complaint, Ethel Spiller, John Molesworth, Lucien Collins, Marian Collins, Rob Roy Spiller, Barbara Spiller, and David Robertson, are landowners in Kimble and Hays Counties[3] whose land and water supplies would be traversed and arguably threatened by the proposed Longhorn Pipeline. The final plaintiff in the First Amended Complaint, the Barton Springs-Edwards Aquifer Conservation District, is a political subdivision of the State of Texas charged with the conservation and protection of

[3] Robertson is the only plaintiff whose land is in Hays County. The rest are Kimble County landowners.

groundwater in a four-county district,[4] through which the proposed pipeline would flow. Plaintiffs Hugh Bob Spiller, Mary Lee Spiller, Rob Roy Spiller, Ethel Spiller, Bea Ann Spiller, and John Molesworth filed notices of voluntary dismissal before any answer or motions for summary judgment were filed.[5] Additionally, the City of Austin has been granted leave to intervene as a plaintiff because the proposed pipeline would traverse the City and potentially threaten its water supply. The Lower Colorado River Authority ("LCRA") has also filed a Motion to Intervene as Plaintiff [#56], which the Court hereby grants in this opinion and order because of the LCRA's interest in

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[4] Those four counties are Hays, Travis, Bastrop, and Caldwell.

[5] Defendant Longhorn Pipeline Company argues this lawsuit was orchestrated and is being financed by Navajo Refining Company. Navajo currently supplies refined petroleum to the markets to which Longhorn plans to deliver the same products after completing the pipeline. Indeed, on May 8, 1998, counsel for the plaintiffs stated in a letter to the plaintiffs:

> Navajo Refining and its parent corporation, Holly Corporation, which are billion dollar a year corporations with all the assets necessary to handle any potential liability, have agreed and are in agreement with paying all of the expenses, costs, liability and any other category of money that might be associated with this litigation. . . .

Longhorn Pipeline, L.P.'s Rule 12(b)(6) Motion to Dismiss [#28], exh. 2 (Deposition of Mary Lee Spiller, dep. exh. 9). Furthermore, at least two of the original plaintiffs did not understand the litigation counsel would be initiating on their behalf, *see id.*, exh. 2 (Deposition of Mary Lee Spiller at 17-19) & exh. 3 (Deposition of Hugh B. Spiller at 7-8), and six plaintiffs have filed notices of voluntary dismissal.

As unsettling as these issues may be, however, they are irrelevant to the Court's analysis of the merits of the plaintiffs' case as stated in the First Amended Complaint.

managing the water supply over which a large portion of the proposed pipeline would traverse[6]

Longhorn Partners Pipeline, L.P. ("Longhorn") is a Delaware partnership[7] headquartered in Dallas, Texas. Longhorn intends to operate a pipeline project, hereinafter referred to as the "Longhorn Pipeline," which will be capable of transporting refined petroleum products from the Gulf Coast of Texas, across the entire state for approximately 700 miles, to El Paso and points beyond. Longhorn has acquired a 450-mile segment of pipeline from Exxon that was built in 1950 and was used until 1995 to transport crude oil from Crane, Texas to a refinery in Baytown, Texas. Longhorn plans to convert this pipeline to transport refined petroleum products between the Gulf of Mexico and Crane and to construct a new 250-mile pipeline segment from Crane to El Paso to complete the petroleum transportation project. Longhorn plans to fill the pipeline with refined petroleum products beginning on October 19, 1998 and to begin actively transporting the petroleum products in December 1998.[8] The plaintiffs argue Longhorn must comply with several federal regulations, receive government authority, and secure right-of-ways from various federal agencies, which amounts to

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[6] The LCRA's complaint and application for preliminary injunction, which the Court orders filed in this opinion and order, are substantially similar to those filed by the other plaintiffs, including the City of Austin.

[7] The partnership's general partner is Longhorn Partners GP, L.L.C., and its limited partners include Exxon Pipeline Company, Amoco Pipeline Company, Williams Pipeline Company, the Beacon Group Energy Investment Fund, L.P., and Chisholm Holdings.

[8] *See* Hearing II, at 13.

"major Federal action" by the federal government in the pipeline project.

The plaintiffs have sued a number of defendants. Defendant Rodney Slater is the Secretary of the United States Department of Transportation ("DOT"). DOT has the duty to enforce the HLPSA and is the federal agency that has been the most intimately involved with safety issues surrounding the Longhorn Pipeline. The Federal Energy Regulatory Commission ("FERC") was originally a defendant, but it has been dismissed because its only function has been in ratemaking. Defendant Robert M. Walker is the Acting Secretary of the Department of the Army (the "Army"). Longhorn has requested that the Army grant it right-of-way permits to cross federal public lands, particularly Fort Bliss in El Paso County, in carrying out the pipeline project. The Army Corps of Engineers ("Army Corps") must approve pipeline construction and modifications crossing navigable waterways such as the Pecos River and the James River. The Army Corps must also issue a permit before Longhorn may tunnel across or under Greens Bayou, pursuant to the Rivers and Harbors Act. Defendant Carol Browner is the Administrator of the Environmental Protection Agency ("EPA"). The EPA is responsible for the issuance and enforcement of permits to Longhorn for construction and operation activities, pursuant to the Clean Water Act's National Pollutant Discharge Elimination System. Because of the alleged involvement of all of these federal agencies, the plaintiffs also named the United States as a defendant. Another agency of the United States government that is not named as a defendant, the Federal Communications Commission ("FCC"), is allegedly involved because it would permit and license

Longhorn's system of remote, satellite-directed control of an automatic shut-off valve system.

The plaintiffs allege jurisdiction under the NEPA and the Administrative Procedures Act ("APA"). They seek several remedies in this lawsuit: (1) an injunction to preserve the status quo until an adjudication on the merits; (2) a declaratory judgment that the federal defendants have violated the National Environmental Protection Act ("NEPA"); (3) an injunction requiring the federal defendants comply with the NEPA; (4) an injunction requiring the federal defendants to revoke any approvals or permits for the pipeline project until NEPA compliance; (5) an injunction prohibiting any further construction; and (6) costs and attorneys fees.

The standard criteria for a preliminary injunction is that a plaintiff must demonstrate the following elements for relief: (a) a substantial likelihood of success on the merits, (b) a substantial threat of irreparable injury to the plaintiff if the injunction is not granted, (c) the balance of hardships in favor of the plaintiff and not the defendant, and (d) the absence of a disservice to the public interest if the injunction is granted. *DSC Communications Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996); *Rodriguez v. United States*, 66 F.3d 95, 97 (5th Cir. 1995).

II. Standing

FERC and DOT have filed motions to dismiss based in part on their arguments that the plaintiffs have no standing to sue them. To establish the "irreducible constitutional minimum of standing," the plaintiffs must demonstrate: (1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) that the injury is

likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* The second and third constitutional standing elements are not in dispute in this case. FERC and DOT challenge the first element, "injury in fact," which requires the allegation of a concrete and personalized violation of a legally protected interest that is actual or imminent, not conjectural or hypothetical. *Id.* The plaintiffs argue the injury in fact is the federal agencies' failure to conduct an EIS.

The second constitutional standing prong, causation, is tautologous in this case because is necessarily satisfied if the plaintiffs can establish an injury in fact. The challenged action is the failure to conduct an EIS, which by definition caused the "injury" to the plaintiffs of having no EIS conducted. The third standing prong, redressability, is also satisfied if injury in fact is satisfied because the relief sought is the mere procedure of conducting an EIS, not necessarily the prohibition of the pipeline or alteration of its route. *Id.* at 2142 *n.7; see also Committee to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 452 (10th Cit. 1996) ("Under the [NEPA], an injury results not from the agency's decision, but from the agency's *uninformed* decisionmaking.") (emphasis in original).

The plaintiffs allege jurisdiction under the APA and the NEPA and therefore must establish statutory standing based on those claims. The APA states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" 5 U.S.C. § 702. The defendants argue the plaintiffs cannot sue under the APA because there has been no "final agency

action." *See Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3185-86 (1990). However, the defendants' framing of the issue is incorrect.

In *Bennett v. Spear*, 117 S. Ct. 1154, 1168-69 (1997), the Supreme Court was not persuaded by a similarly flawed argument. In *Bennett*, the plaintiffs challenged a biological opinion by the Fish and Wildlife Service. *Id.* at 1158. The government argued the plaintiffs had no standing under the APA because the Fish and Wildlife Service had not made any "final agency action" based on the challenged biological opinion. *Id.* at 1168. The Court determined the biological opinion itself constituted a "final agency action" because it satisfied a two-part test. First, the action marked the consummation of the agency's decisionmaking process. *Id.* (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 63 S. Ct. 431, 437 (1948)). Second, the action was one "by which rights or obligations ha[d] been determined, or from which legal consequences [would] flow." *Id.* (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 91 S. Ct. 203, 209 (1970)) (internal quotation marks omitted).

Similarly, in the present case the defendants argue the substantive agency decisions regarding the Longhorn Pipeline are not final. However, FERC and DOT concede their decision not to conduct an EIS is final. This satisfies the first prong of the test enunciated in *Bennett* because the final decision not to conduct an EIS is a "consummation of

the agency's decisionmaking process." *Id.*[9] It also satisfies the second prong because the agencies' decisions that they have no "obligation" to conduct an EIS gives the agencies the "legal right," from which flows the "legal consequence" that the agencies then conduct their regulation regarding the Longhorn Pipeline pursuant to their interpretation of the law. In short, the federal defendants have each denied authority and responsibility to conduct an EIS on the construction and/or operation of the pipeline. Therefore, the plaintiffs have standing to sue under the APA.

Insofar as constitutional standing under Article III with regard to the NEPA claims,

> [t]he procedural injury implicit in agency failure to prepare an EIS – the creation of a risk that serious environmental impacts will be overlooked – is itself a sufficient "injury in fact" to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that

[9] The Army has not filed a motion to dismiss, but it appears that the Army and/or the Army Corps has made at least some final decisions to take actions without conducting an EIS. Therefore, the analysis finding the plaintiffs have standing to sue FERC and DOT also applies to the Army. To the extent the Army has not made a final decision whether to conduct an EIS, the Court does not have jurisdiction over those specific claims until a final decision is made. *See* Hearing I, at 35-37; Hearing II, at 54-55 (both stating the Army has not decided whether to conduct an EIS or environmental assessment ("EA") before making a decision on whether to grant the Fort Bliss easement). Because the Court's analysis ultimately considers whether the cumulative impact of all agency actions qualify as a "major Federal action," however, the question of the Court's jurisdiction over this one specific claim is irrelevant.

> they [*sic*] can] expect [] to suffer whatever environmental consequences the project may have.

Sabine River Auth. v. United States Dep't of the Interior, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)) (brackets in *Sabine River Auth.*). "In the context of NEPA, . . . the Supreme Court has . . . explained that beyond the constitutional standing requirements, 'the plaintiff must establish that the injury he complains of . . . falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.'" *Id.* at 675 (quoting *Lujan*, 110 S. Ct. at 3186). In applying this standard, the *Sabine River Authority* court was "persuaded that the injuries alleged by the plaintiffs in their complaints – harmful effects on the quality and quantity of East Texas' water supply – '[were] among the *sorts* of interests' that NEPA was specifically designed to protect," and that such "alleged injuries fall squarely within the class of injuries that NEPA safeguards." *Id.* (quoting *Lujan*, 110 S. Ct. at 3187) (emphasis in original). The injuries alleged by the plaintiffs in this case include harmful effects on the quality and quantity of Central Texas' water supply and are clearly sufficient to confer standing under *Sabine River Authority*.

Longhorn nevertheless argues the plaintiffs have no standing because they cannot show an injury in fact that would likely be redressed by the relief sought: the plaintiffs are located hundreds of miles from the site of any agency action and have neither alleged nor obtained evidence of a geographic nexus or use of those sites. Regarding the agency actions that relate to the existing pipeline that traverses the plaintiffs' land, these arguments are without merit. The plaintiffs' land would be

directly impacted by the agencies' decisions about the existing pipeline. The only potentially valid argument the plaintiffs have is regarding the claims that could relate only to the pipeline extension or to specific sites such as Fort Bliss or various river crossings. In those instances in which it is possible that Longhorn would merely reroute its pipeline around various obstacles (such as Fort Bliss) or improve the new construction, Longhorn could have a colorable argument that the plaintiffs are too remote geographically from the impact of the agency actions. However, as discussed below, the Court concludes the major Federal action giving rise to a duty to perform an EIS relates to the entire pipeline, not merely to sections of the pipeline far removed from the plaintiffs.

The plaintiffs would therefore fall well within the zone of interests for purposes of enforcing the NEPA. The defendants nevertheless argue the plaintiffs have no standing and their claims are not ripe because final agency action is required here, as well. The plaintiffs argue their claims are ripe against all defendants because their claims allege the defendants have failed to undertake an EIS when they should have. "[A] person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club,* 118 S Ct. 1665, 1672 (1998). Therefore, as with the APA standing analysis *discussed* above, the final action is essentially the refusal to conduct an EIS, and the plaintiffs clearly have standing under the NEPA, as well.

III. Major Federal Action

The NEPA is a procedural statute that mandates a process rather than a result. *Sierra Club v. Espy,* 38 F.3d 792, 796 (5th Cir. 1994). The NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Sabine River Auth.,* 951 F.2d at 676.

An agency's decision not to prepare an EIS is reviewed under the "arbitrary and capricious" standard, whether such analysis is taken under the NEPA, *id.* at 677-78; *see also Marsh v. Oregon Natural Resources Council,* 109 S. Ct. 1851, 1860 (1989), or the APA, 5 U.S.C. § 706(2)(A) (providing that federal courts should uphold actions by a federal agency unless the courts find the acts "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). *See also Brenham Community Protective Ass'n v. United States Dep't of Agriculture,* 893 F. Supp. 652, 656-57 (W.D. Tex. 1995) (holding that the same "arbitrary and capricious" *standard* of review required by the APA applies to actions arising under the NEPA) (citing *Marsh,* 109 S. Ct. at 1860). Under the arbitrary and capricious standard, "administrative action is upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Sierra Club v. Glickman,* 67 F.3d 90, 97 (5th Cir. 1995). This Court is not to merely substitute its judgment for that of the agencies. *See id.*

One provision of the NEPA is at the heart of this case in determining whether any or all of the federal defendants

are obligated to conduct an EIS. Section 102(2)(C) of the *NEPA*, 42 U.S.C. § 4332(2)(C) states:

> The Congress authorizes and directs that, to the fullest extent possible: . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other *major Federal actions significantly affecting the quality of the human environment,* a detailed statement by the responsible official on –
>
> (I) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

(emphasis added).

The plaintiffs argue the involvement of federal agencies in the approval of the Longhorn Pipeline renders it a "major Federal action significantly affecting the quality of the human environment," and therefore an EIS is required. "No litmus test exists to determine what constitutes "major Federal action, [and] '[f]ederal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA.'" *Save Barton*

Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129, 1134 (5th Cir. 1992) (quoting *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir.1990), *cert. denied*, 111 S. Ct. 1017 (1991)). In determining what constitutes "major Federal action," courts look to the regulations and the case law describing the term. *Id.* For example, the Council on Environmental Quality ("CEQ") has issued regulations defining "major Federal action," which are entitled to substantial deference. *Id.* (citing *Andrus v. Sierra Club*, 99 S. Ct. 2335, 2341 (1979)). The primary actors need not be federal agencies for "major Federal action" to exist because "[t]he regulations provide that 'major Federal action' encompasses not only actions by the federal government, but also actions by nonfederal actors 'with effects that may be major and which are potentially subject to Federal control and responsibility.'" *Id.* (citing 40 C.F.R. § 1508.18 (1991)).

Longhorn cites *Barton Creek Association* for the proposition that "[a]lthough desperate environmental plaintiffs have attempted to convert NEPA into a national land use statute, Congress did not intend section 102(2)(C) to apply to actions undertaken by state, local, or private concerns without any federal participation or approval." *Id.* at 1138 (quoting Thomas O. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 837 (1977)). Although the Longhorn Pipeline is clearly an *undertaking* by a private concern, it is equally obvious that it cannot be completed or run "without any federal approval." In fact, Longhorn requires federal approval from numerous federal agencies before it may complete and operate its pipeline. Therefore, contrary to Longhorn's assertions, the case merits a careful examination of

whether these actions of federal approval, alone or in combination, constitute a major Federal action.

The applicable CEQ regulations state that a major Federal action "includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. . . ." *Id.* § 1508.18(a). Furthermore, one of the enumerated categories into which federal actions "tend to fall" is the "[a]ppproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision. . . ." *Id.* § 1508.18(b)(4). However, "a private project does not become a 'major federal action' merely because of some incidental federal involvement." *See Save the Bay, Inc. v. U.S. Corps of Eng'rs,* 610 F.2d 322, 327 (5th Cir. 1980).

The plaintiffs in the instant case assert that several federal agencies individually or in combination are taking actions that amount to "major Federal action" in the Longhorn Pipeline project. In asserting this argument, the plaintiffs point to the definition of "cumulative impact" in 40 C.F.R. § 1508.7, which states,

> *Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually

> minor but collectively significant actions taking place over a period of time.

Another CEQ regulation lists "cumulatively significant impacts" of multiple agency actions on the environment as one of ten factors to evaluate in determining the intensity of an environmental impact. 40 C.F.R. § 1508.27(b)(7). Intensity and context[10] are the two factors in determining whether an action "significantly" affects the human environment. 40 C.F.R. § 1508.27. "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7). Furthermore, "[s]ignificance cannot be avoided by . . . breaking [an action] down into small component parts." *Id.*

In the definition of the "scope" of an EIS, the regulations provide that proposed agency actions are "connected" to other actions, thus requiring collective consideration, if the proposed actions "(I) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; or (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). The Second Circuit has stated that the proper test of a project that is an interdependent part of a larger action and depends on the larger action for its justification is "whether the [proposed] project has independent utility." *Town of Huntington v. Marsh,* 859 F.2d

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[10] *Context* . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. . . ." 40 C.F.R. § 1508.27(a).

1134, 1142 (2d Cir. 1988). When several federal agencies are involved in a project, a "lead agency" must be chosen to supervise the preparation of an EIS. 40 C.F.R. § 1501.5. Other federal agencies which have jurisdiction are considered "cooperating agencies," and the lead agency may even request the involvement as "cooperating agencies" of other federal agencies with expertise in a particular environmental issue, even when those agencies are not directly involved in the project at issue in the EIS. 40 C.F.R. §§ 1501.6, 1508.5.

In describing the difference between an EIS and an environmental assessment ("EA"), the Fifth Circuit has explained:

> An EIS must contain "a detailed statement of the expected adverse environmental consequences of an action, the resource commitments involved in it, and the alternatives to it." *Kleppe v. Sierra Club,* 96 S. Ct. 2718, 2726 (1976). An EA, on the other hand, is prepared in order to determine whether an EIS is required. *Sabine,* 951 F.2d at 677. An EA is a "rough-cut, low-budget environmental impact statement" intended to determine whether environmental effects are significant enough to warrant preparation of an EIS. *Id.* (internal quotation marks omitted). An EA must "include brief discussions of the need for the proposal, of alternatives . . . , of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b).

Sierra Club v. Espy, 38 F.3d 792, 802-03 (5th Cir. 1994). One of the processes an agency should go through to determine whether an EIS is necessary is to conduct an EA. *See* 40 C.F.R. § 1501.4(b), (c).

It is undisputed that no agency even conducted an EA with regard to the 700-mile Longhorn Pipeline. Each agency disclaimed responsibility to even undertake this "rough-cut, low-budget" version of an EIS. The only EA even mentioned in relation to any of the defendants' actions is the general national EA conducted by the Army Corps prior to establishing its national and general permits for construction across navigable waterways and setting out the guidelines for the acquisition of such permits. Any EA allegedly conducted by the Army Corps in this context merely related to the permitting of construction across navigable waterways nationwide, not to any specific EA relating to the Longhorn Pipeline or any pipeline. *See* Hearing II, at 14-15. The federal agencies argue, however, that not even an EA was required of any of them because their actions were categorized with those that "[n]ormally [do] not require either an [EIS] or an [EA] (categorical exclusion)." 40 C.F.R. § 1501.4(a).[11]

It is also beyond dispute that the construction of the Longhorn Pipeline has a "significant effect on the quality of the human environment." To the extent Longhorn argues this is only true if there is a leak in the pipeline, that argument is frivolous,[12] especially since Longhorn

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[11] Specifically, DOT asserts its actions are excluded because they involve "bringing judicial or administrative civil or criminal enforcement actions." 40 C.F.R. § 1508.18(a); *see infra* part VIII. Longhorn argues the EPA's actions are statutorily excluded under 33 U.S.C. § 1371(c)(1) ("[N]o action of the Administrator taken pursuant to [Chapter 26 of Title 33] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [the NEPA]."). *See infra* Part VII.

[12] By Longhorn's logic, a proposed federally funded and constructed nuclear power plant in Manhattan would not be subject to an EIS,

(Continued on following page)

itself admits that the existing pipeline has leaked on several occasions in the past. The crucial issue before the Court is therefore whether any or all of the federal agency defendants have taken a "major Federal action" within the meaning of the NEPA.

Longhorn asserts it is frivolous for the plaintiffs to suggest the federal defendants should be required to conduct an EIS on a pipeline that has safely transported petroleum liquids over environmentally sensitive areas since it was first constructed. However, Longhorn's argument is again what is frivolous. The undisputed evidence before the Court shows Longhorn intends to pump refined petroleum products through pipes that previously carried crude oil and in fact has a history of leaking crude oil on numerous occasions.[13] The end petroleum products Longhorn now intends to transport are much more dangerous to transport than is crude oil. While crude oil is thick and relatively slow to spread after a leak, refined petroleum products are far more flammable and have a greater liquidity to spread quickly after a leak, posing a greater threat to nearby aquifers, rivers, and property.[14]

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assuming there would only be a significant effect on the human environment "if" nuclear material or waste escaped into the environment.

[13] *See* Longhorn Pipeline, L.P.'s Rule 12(b)(6) Motion to Dismiss [#28], at 11 n.16 ("There have been instances of isolated leaks on the pipeline. However, there have been no known cases of permanent damage to the environment or damages to sources of water supplies.").

[14] *See, e.g.*, Longhorn Partners Pipeline, L.P.'s Rule 12(b)(6) Motion to Dismiss, exh. 1.

Similarly, Longhorn's arguments about Navajo Oil financing this litigation to stifle competition could possibly be true,[15] but they are irrelevant to the Court's analysis. The Court's only duty is to apply the relevant law and see if any of the federal defendants are required to conduct an EIS. Each federal agency defendant argues it is not responsible for conducting an EIS, and the Court will not disturb such an agency decision unless it is arbitrary and capricious. However, "no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid [NEPA] compliance." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 96 S. Ct. 2430, 2438 (1976).

IV. FERC

FERC first argues its decisions are only reviewable by a federal court of appeals under the Hobbs Act, 28 U.S.C. §§ 2321, 2342. Courts of appeals have "the same jurisdiction to review FERC orders concerning oil pipelines as it has to review orders of the Interstate Commerce Commission under 28 U.S.C. §§ 2321, 2342 (1976)" on October 1, 1977. *Earth Resources Co. v. FERC*, 628 F.2d 234, 235 (D.C. Cir. 1980). Before it was amended in 1996, the Hobbs Act stated, "[e]xcept as otherwise provided by an Act of Congress, a proceeding to enjoin . . . a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals. . . ." 28 U.S.C. § 2321(a) (1976). Prior to the 1996 amendments, 28 U.S.C. § 2342 (5)

[15] However, the interventions by the City of Austin the LCRA undermine Longhorn's argument that this lawsuit is nothing more than an anti-competition ploy.

stated, "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of . . . all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title. . . ." 28 U.S.C. § 2342(5) (1976).

FERC cites *Bywater Neighborhood Association v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990) for the proposition that plaintiffs cannot "end run" the exclusive jurisdiction of the courts of appeals laid out in 28 U.S.C. § 2342 by challenging agency decisions in the district courts. However, "unlike review of the Federal Communications Commission action at issue in [*Bywater*], . . . judicial review of decisions of [FERC] is not clearly and exclusively committed to the courts of appeals. Instead, procedures for judicial review of Commission decisions vary depending on the statutory authority under which the challenged order was issued." *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1192 (D.C. Cir. 1995). The D.C. Circuit distinguished the rule of *Earth Resources* as follows: "The opinion, a four sentence per curiam dismissing a petition under the final order doctrine, concerned the interpretation of jurisdiction over Commission pipeline orders in a petition from an order arising under the ICA, not the OCSLA." *Id.* at 1193 n.13. Similarly, this case can be distinguished as arising under the NEPA, not the ICA, meaning that the exclusive jurisdiction of the court of appeals does not apply, as it did in *Earth Resources.*

The plaintiffs argue requiring them to file this case in a court of appeals would cause bifurcated and fragmented judicial review since the plaintiffs would have to sue the

other defendants in federal district court.[16] More importantly, the plaintiffs argue they are not attempting to appeal an order of FERC. Because this case is primarily about FERC's decision not to conduct an EIS rather than a case about appealing a substantive rate decision, the Court concludes that it has jurisdiction, and FERC's argument about exclusive jurisdiction in the courts of appeals fails. It appears the jurisdiction under the NEPA triggers the "unless otherwise provided by an Act of Congress" exception to the provision mandating the exclusive court of appeals jurisdiction for FERC rules, regulations, or orders.

Therefore, the Court reaches the analysis of whether the plaintiffs have stated a claim for which relief may be granted against FERC. FERC "has the duties and powers

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[16] The plaintiffs cite *City of Rochester v. Bond*, 603 F.2d 927, 935-36 (D.C. Cir. 1979), a case involving a Federal Communications Commission ("FCC") order rather than a FERC order, for the proposition that the Court should hear the claims against FERC in the district court in order to avoid "bifurcation" and "fragmentation." The *Bond* court was not concerned with "bifurcation" or "fragmentation" of individual cases as the plaintiffs argue would occur by forcing them to sue FERC in the Court of Appeals in this case. Instead, *Bond* was concerned with the "bifurcation" and "fragmentation" that would cause "duplication and inconsistency" if the district courts were allowed to hear appeals on orders instead of requiring appellate courts to hear all appeals and thus foster uniformity, as Congress intended. *Id.* at 936-37.

The court in *Bond* stated that "[a]ctions which are not (or not yet) orders but which are nonetheless reviewable may be raised in the district court, whose jurisdiction is thus residual insofar as it exists only to review matters for which statutory review is, for one reason or another, inadequate." *Id.* However, the court held that a district court may not "exercise concurrent jurisdiction merely because a violation of NEPA alleged," and that such an "allegation may be raised directly in the court of appeals." *Id.* at 936.

related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission." 49 U.S.C. § 60501. From 1906 through September 1977, the Interstate Commerce Commission ("ICC") regulated oil pipeline rates under the Interstate Commerce Act ("ICA").

The plaintiffs argue that FERC's ratemaking proceedings are major Federal actions that can have a significant effect on the environment. Furthermore, the plaintiffs argue that FERC's acts in combination with the many other federal actors that together make the Longhorn Pipeline a possibility (and make it a possibility along the very route Longhorn has chosen) certainly cross the NEPA-established major Federal action threshold and require the preparation of an EIS. The plaintiffs assert Longhorn has expressly linked the ongoing ratemaking proceeding before FERC to "environmental impacts." Certainly, Longhorn made overtures to FERC arguing that favorable rate decisions would allow Longhorn to run the pipeline in a more environmentally friendly manner. Therefore, the plaintiffs assert that it is "at best empty formalism to suggest the FERC has nothing to do with the environmental issues raised in this NEPA litigation." Plaintiffs' Memorandum on the Appropriateness of FERC as a Party [#15], at 6.

The plaintiffs argue that no court has ever held that FERC and its products pipeline activities are exempt from the NEPA. However, the plaintiffs also fail to cite any case in which FERC was ordered to conduct an EIS solely because of its ratemaking functions. Furthermore, the Court cannot find any such cases after its own review. FERC argues *Aberdeen & Rockfish Railroad Co. v. Students*

Challenging Regulatory Procedures, 95 S. Ct. 2336 (1975) ("*SCRAP II*") provides strong support that "general revenue proceedings" are major Federal actions so long as they have substantial effects on the human environment. *Id.* at 2355. However, *SCRAP II* is not particularly on point because it involved an EIS conducted by the ICC proceeding on railroad rates, and neither party contested the need to conduct an EIS based on the facts of that case.[17] More importantly, based on the facts of the instant case as alleged by the plaintiffs, the Court is not convinced FERC was arbitrary and capricious in concluding it has not undertaken a major Federal action with regard to the Longhorn Pipeline. Considering all the federal agency defendants involved in this case, even if a combination of the federal agencies' participation were to constitute a major Federal action, it would be foolish to require FERC to be the one to conduct an EIS, when its involvement relates only to ratemaking as opposed to environmental or safety issues.[18] Accordingly, in its order of July 30, 1998, the Court dismissed FERC as a defendant in this case.

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[17] Additionally, *SCRAP II* is distinguishable because the rates involved arguably discriminated against the transport of recyclable materials. *SCRAP II*, 95 S. Ct. 2345.

[18] This is not to say, of course, that any future EIS should not consider FERC's ratemaking and its effect on the human environment or that FERC would not be proper "cooperating agency" in any such EIS. The Court's conclusion is simply that, looking at the defendant federal agencies involved in this case, it is improvident to exercise jurisdiction over FERC as a defendant when the other federal agency defendants are so much more involved in the "major Federal action" involving the Longhorn Pipeline and have more discretion and responsibility in regulating the environmental and safety issues involved.

V. The Army

The Army and the Army Corps clearly play important roles in the Longhorn Pipeline project. The Army is considering Longhorn's request for an easement across Fort Bliss, near El Paso. The defendants argue this easement is relatively small, only six miles of a 700-mile pipeline, but it is clearly an important aspect in the viability of the Longhorn Pipeline. The Army Corps has been asked to issue a general permit under section 10 of the Rivers and Harbors Act to authorize Longhorn to lay pipeline under Green's Bayou in Harris County. Finally, Longhorn has requested a nationwide permit under section 404 of the Clean Water Act authorizing Longhorn to cross waters for the western extension of the pipeline from Crane to El Paso. Longhorn argues these actions affect an area too far removed from the plaintiffs to show a geographical nexus. Furthermore, Longhorn cites *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272 (8th Cir.), *cert. denied*, 101 S. Ct. 110 (1980), which held that a permit allowing transmission lines to cross a navigable waterway was not sufficient to convert the construction of the entire transmission line into a major Federal action.

Clearly, however, the instant case is not about one permit to cross one navigable waterway. The Longhorn Pipeline depends on several permits by the Army Corps itself. Furthermore, the Army Corps permitting is not the only federal action alleged in this case. One of the purposes of analyzing the Army's role at this stage is to see whether its role combines with other federal action to amount to "major Federal action." Longhorn admits as much in its motion to dismiss when it cites the Army Corps' regulations for the proposition that the scope of analysis for an EA of a regulated activity that is a link in a

transportation project should address the federal action, "i.e., the specific activity requiring [an Army] permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (*or other Federal agencies*)." *See* 33 C.F.R. Part 325, App. B (emphasis added).

The Army's role in granting permits for construction over navigable waters and granting a right-of-way over Fort Bliss combine to have such a crucial impact on the construction of the Longhorn Pipeline at so many points along the pipeline that it can only be described as "major Federal action." However, the Army has represented to the Court that it has not made a final decision whether to conduct an EIS on the Fort Bliss easement. Considering only the actions of the Army Corps, the multiple permits themselves constitute major Federal action. *See Sierra Club v. Sigler*, 695 F.2d 957, 965 (5th Cir. 1983) (holding that the Army Corps' decision to issue permits for private construction of a multipurpose deepwater port and crude oil distribution is subject to NEPA); *Stewart v. Potts*, 996 F. Supp. 668, 672 (S.D. Tex. 1998) ("The issuance of a section 404 permit by the Corps of Engineers is deemed to be a 'major Federal action' to which NEPA's mandates apply.") (citing *Sierra Club*, 695 F.2d at 964).[19] Therefore,

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[19] Both the plaintiffs and defendants argue the holding of *Stewart* helps their respective cases. But the facts of *Stewart* are too distinct from those in this case to be particularly helpful in the analysis of the present case. In *Stewart*, the court held that the Army Corps' EIS regarding two acres of wetlands scattered across a 200-acre tract to be turned into a golf course must include an analysis of the environmental impact on the uplands forest to be fragmented by the construction of the golf course. *Stewart*, 996 F. Supp. at 682-83.

based on the ripe issues before the Court, the Army's isolated decision not to conduct an EIS based on its actions will not be disturbed. As with the other federal agency defendants, however, the role of the Army in conjunction with that of the other federal agencies will be discussed in more detail in Part IX of this opinion.

VI. EPA

Longhorn argues the EPA permitting under the Clean Water Act at issue in this case is exempt from the NEPA. *See* 33 U.S.C. § 1371(c)(1) ("[N]o action of the Administrator taken pursuant to [Chapter 26 of Title 33] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [the NEPA]."). The plaintiffs have failed to cite authority contradicting this plain statutory statement. Therefore, although any reasonable citizen untainted by the handicap of a juris doctor would believe the EPA is the proper agency to investigate the environmental impact of a pipeline across Texas, the legal conclusion is that the EPA has no duty to conduct an EIS based on its involvement under the Clean Water Act.

VII. DOT

DOT concedes that it imposes substantial obligations on pipeline operators with respect to the construction, operation, maintenance, and inspection of pipelines. DOT argues, however, that these provisions do not necessitate or otherwise provide for government action as a prerequisite to the construction and commencement of operations by a pipeline and certainly do not amount to major Federal action within the meaning of the NEPA.

The Office of Pipeline Safety ("OPS") administers DOT's regulatory program to ensure the safe transportation of various hazardous liquids by pipeline under the HLPSA. OPS is responsible for inspecting pipelines before they are placed in service to ensure they are in accordance with DOT regulations and are being operated safely. If violations are found, OPS notifies the pipeline operator of the deficient condition, and at its discretion, may initiate enforcement action against the operator. DOT asserts that no permits, licenses, authorizations, or approvals are involved in OPS's inspection program. In addition to its compliance monitoring program, OPS is responsible for requiring, reviewing, and approving pipeline operator facility response plans, which are designed to improve response capabilities and minimize the environmental impact of any oil discharges. *See* 49 C.F.R. § 194. Although OPS is responsible for reviewing every operator's response plan, DOT asserts this process does not result in the issuance of a permit or license. *See* 49 C.F.R. § 194.119.

OPS has responsibility for pipeline safety for both intrastate and interstate pipelines. OPS has exercised its option to allow Texas to assume inspection and enforcement responsibility over its intrastate pipelines. *See* 49 U.S.C. § 60105. The Texas Railroad Commission ("TRC") is therefore responsible for the inspection of intrastate pipelines as an agent of OPS and DOT?[20] OPS may also enter into agreements with states to allow states to act as inspection agents for interstate pipelines, but OPS retains

[20] Because TRC acts as an agent of OPS and therefore DOT, it is undisputed that the actions conducted by TRC are considered actions of DOT for purposes of major Federal action analysis.

responsibility for any necessary enforcement action. *See* 49 U.S.C. § 60107. In this case, the OPS Southwest Region has entered into an interstate inspection agreement with the TRC in January 1996 to the present time to authorize the TRC to act as OPS's agent for the inspection of the Longhorn Pipeline from Crane to Baytown, Texas.[21] It is undisputed that DOT did not conduct an EIS or EA before making the decision to appoint TRC as its agent in carrying out OPS's responsibilities with regard to the Longhorn Pipeline, either in the intrastate or interstate oversight plans.

DOT argues that OPS has no authority to determine whether or where a pipeline operator should construct hazardous liquid pipelines and that there is no requirement that a pipeline operator seek DOT's approval before making modifications to an existing pipeline. Furthermore, DOT argues there is no major Federal action because no actions by nonfederal actors are "potentially subject to federal control or responsibility." *See Save Barton Creek*, 950 F.2d at 1134; 40 C.F.R. § 1508.18. DOT argues no action OPS can take has the required "ability to influence or control the outcome" of Longhorn's decisions to modify the existing pipeline or to construct the connecting pipeline. Instead, DOT characterizes OPS's responsibility as relating to the safe operation of the pipeline.

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[21] Because TRC inspects intra- and interstate pipelines in Texas, DOT asserts that its position regarding no need for an EIS would not have changed if Longhorn had represented its pipeline activities as "interstate" from the beginning instead of shifting its characterization from "intrastate" to "interstate" in January 1998.

The specific actions OPS argues it has taken are (1) through its agent TRC, OPS inspected the existing pipeline in 1996 for compliance with safety standards; and (2) OPS subsequently issued a letter to Exxon Pipeline requesting that identified deficiencies in the pipeline be corrected. DOT argues neither of these actions are "major Federal actions" for the purposes of the NEPA because "[a]ctions do not include bringing judicial or administrative civil or enforcement actions." 40 C.F.R. § 1508.18(a). DOT argues the OPS enforcement program falls into this excluded category of nonaction because it consists of making inspections to determine compliance with the requirements of 49 U.S.C. § 60101 *et seq.* and enforcing compliance by issuing warning letters or initiating civil or criminal enforcement proceedings. *See* 49 CFR §§ 190.201-190.235

This is a weak attempt at wordplay by the defendants, to a large extent. Obviously, if OPS did not grant the approval required and/or imposed harsh penalties, Longhorn would not be able to use the pipeline it intends to use. Hence, DOT does in fact "have the ability to control the actions of" Longhorn. See [#13], at 8-9. Furthermore, DOT's actions are not limited to mere "judicial or administrative civil or criminal enforcement actions." As Longhorn readily admits, DOT has a major role in ensuring the safety of the Longhorn Pipeline. DOT admits this role extends to monitoring and oversight of the pipeline and cooperation with Longhorn to see that the pipeline meets safety standards. DOT's actions are clearly not limited to actions before a court or administrative tribunal or emanating therefrom. As admitted in DOT's argument, its actions in this case have been "preliminary steps in the enforcement process." Nowhere does (or can) DOT allege

its action is limited to actually "bringing judicial or administrative civil or criminal enforcement actions." Hence, the defendants' attempt to argue that DOT is responsible for ensuring the safety of the pipeline, but only through exempt enforcement proceedings, falls on deaf ears. By DOT's and Longhorn's logic, any federal action would be exempt under 40 C.F.R. § 1508.18(a) because the ultimate force behind any federal rule, regulation, or policy is an enforcement action to secure compliance with the federal agency's pronouncements.

Moreover, DOT overlooks certain actions it has taken that involve at least some "action." First, DOT through OPS decided to authorize TRC to act as its agent in this important matter that could have serious consequences with regard to environmental safety. While OPS's authorization of TRC to act as its agent in and of itself is arguably not a major Federal action, it is certainly a factor to be considered. Moreover, DOT has not refuted the plaintiffs' argument that OPS has authority to determine the "frequency and type of inspection and testing . . . on a case-by-case basis." 49 U.S.C. § 60108(b). This is an extremely important policy decision in the instant situation, one which impacts the entire pipeline safety regime and must consider several important substantive factors.[22]

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[22] In deciding the frequency and type of inspections, DOT is to consider:

(A) the location of the pipeline facility.

(B) the type, size, age, manufacturer, method of construction, and condition of the pipeline facility.

(C) the nature and volume of material transported through the pipeline.

(Continued on following page)

It is noteworthy that Longhorn, while not conceding any EIS is required, states, "[i]f this Court were to order an EIS, then the only logical candidate for the preparation of the EIS would be the DOT." Longhorn argues that the net result of ordering DOT to prepare an EIS would be that DOT would be conducting an evaluation of the effectiveness of the HLPSA and the regulations promulgated thereunder to determine how well this comprehensive regulatory scheme was working in relation to the Longhorn project. Longhorn further argues such an undertaking would be nothing more than a redundant "collateral attack" upon the OPS's current regulations, which Congress has entrusted DOT to promulgate and enforce. Longhorn concludes that ordering DOT to issue a report evaluating the effectiveness of regulations within its grant of congressional authority and its area of expertise makes no sense.

The Court concludes, however, that DOT's extensive and intricate oversight and approval of the Longhorn

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(D) the pressure at which that material is transported.

(E) climatic, geologic, and seismic characteristics (including soil characteristics) and conditions of the area in which the pipeline facility is located.

(F) existing and projected population and demographic characteristics of the area in which the pipeline facility is located.

(G) for a hazardous liquid pipeline facility, the proximity of the area in which the facility is located to an area that is unusually sensitive to environmental damage.

(H) the frequency of leaks.

(I) other factors the Secretary decides are relevant to the safety of pipeline facilities.

49 U.S.C. § 60108(b)(1).

Pipeline's safety and emergency-response plan constitutes major Federal action significantly affecting the human environment. In naming TRC as its agent, deciding when and how to inspect the pipeline, conducting inspections and requesting changes, and overseeing the emergency response plan submission, DOT has engaged in extensive and pervasive participation in important safety provisions essential to Longhorn's building and running of the pipeline. If this is not major Federal action through regulation of a private project, it is hard to imagine what would be. DOT's conclusion to the contrary is arbitrary and capricious. Alternatively, as discussed below, DOT's action, combined with the various important actions by other federal agencies such as the Department of the Army and FERC, clearly combine to constitute a major Federal action.

VIII. Combination of Actions by Federal Agencies

The Court has no evidence before it that the federal agency defendants have made any effort to "segment" their regulation of the Longhorn Pipeline project in order to avoid the necessity of performing an EIS and thereby contravene the spirit of NEPA. *See Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 980) ("Segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action has been held to be unlawful."). The federal agency defendants have, however, wholly failed to consider the cumulative effects of the numerous actions by the various federal agencies in determining whether they have taken major Federal action. Although this may not have been part of a willful scheme to "segment" the federal agencies' role in

the Longhorn Pipeline, the failure to consider the cumulative effect has caused no EIS to be conducted thus far on a project that clearly involves "major Federal action" within any reasonable definition of that term.

Federal agencies have numerous significant responsibilities with regard to the Longhorn Pipeline. As explained in the CEQ regulations and the case law, *see supra* Part III, the cumulative impact of the federal agencies' actions must be considered to determine whether major Federal action has occurred. This case is a perfect example of why the law, not to mention common sense, dictates that the cumulative federal impact must be considered. Several agencies play roles that are arguably separate "major. Federal actions." Any one agency's decision not to conduct an EIS based on its own actions in isolation may or may not be arbitrary and capricious, but it is clearly arbitrary and capricious for none of the federal agencies to recognize that major Federal action requiring an EIS has occurred in this case.

The federal actions are numerous and necessary to the operation of the pipeline. The Army Corps must permit construction across the several navigable waters. The Army has been asked to grant an easement across federal lands at Fort Bliss. DOT has designated TRC to ensure Longhorn's compliance with the HLPSA. DOT has also established an inspection regime and carried out its inspection process, making efforts short of "bringing enforcement actions" to see that Longhorn complies. Finally, DOT is responsible for ensuring that Longhorn has an adequate emergency response plan in case a problem does occur. Additionally, Longhorn has pursued favorable rates from FERC, arguing beneficial rates based on the existing pipeline between Crane and Baytown will

be good for the environment.[23] Therefore, the federal government controls the entire pipeline process: construction, operation and safety inspection, sales of the petroleum products, and accident cleanup. It is not only arbitrary and capricious to assert this combination of actions is not major Federal action, but it blatantly flies in the face of common sense. Only lawyers could make such an argument with a straight face[24] Aside from this substantive arbitrariness and capriciousness in finding no major Federal action, the federal agencies' continued downplaying of their individual actions and the absence of any consideration of the combined federal impact on this obviously unitary pipeline project demonstrate arbitrariness and capriciousness in the procedures applied in the consideration of the presence of Federal action. The decision of the federal government through its agencies that no EIS is required must therefore be overturned.

IX. Conclusion

The plaintiffs have succeeded in carrying the burden to have their application for preliminary injunction

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[23] The EPA has responsibilities under the Clean Water Act, although those actions are exempt from NEPA analysis. In the future, Longhorn will likely need FCC approval of its satellite pipeline safety system. Neither of these actions are weighed in the Court's consideration, however, and neither action needs to be considered to reveal overwhelming evidence of "major Federal action."

[24] Notably, the lawyers involved in this case are highly competent and have made all arguments persuasively. That does not change the fact that any prudent person on the street could see that the actions by the federal agencies in this case can only be described as major Federal action.

granted. First, their likelihood of success on the merits is significant. The Court has been provided with voluminous briefs and evidence and has conducted two hearings. Although the Court will fairly and openly consider the case as it moves toward a final resolution on the merits, it is likely the defendants have offered their best arguments and evidence, and it is unlikely the defendants will come forward with new arguments or evidence to make the Court come to a different conclusion on the merits. Second, there is a serious threat of irreparable injury if the preliminary injunction is not granted. As of October, Longhorn plans to pump refined petroleum products through the pipeline, and operation of the pipeline without an EIS could lead to unsafe operation causing a spill that would threaten human life, property, water supplies, natural resources, and certain endangered species. Third, the hardships balance in favor of the plaintiffs. The Court recognizes the economic hardships this injunction will cause Longhorn, but the damage to the plaintiffs' land and water supplies would be more devastating. Additionally, Longhorn could have encouraged the federal agencies to conduct an EIS earlier so that this litigation would not have been necessary. Longhorn cannot now complain about being prohibited from pumping pressurized petroleum products for the first time across Texas for 700 miles without any federal agency conducting an EIS. Fourth, the public interest favors the protection of the human environment, with a special emphasis on the urgency surrounding the integrity of our water supply in this drought-ridden Texas summer.

The factors for issuing a preliminary injunction weigh heavily in favor of the plaintiffs, and the preliminary injunction will therefore be granted. Petroleum products

may not be placed into the pipeline until this Court, the Fifth Circuit, or the United States Supreme Court orders otherwise. Construction activities short of filling the pipeline with petroleum products may continue as allowed by the federal government at Longhorn's own risk. The Court will lift its injunction after a federal agency has conducted an EIS in compliance with the NEPA and its regulations. Naturally, the Court may also lift its injunction earlier, depending on the rulings on the merits of this case. Because the Court is cognizant of the enormous expense this injunction will cause Longhorn, all reasonable efforts will be made to expedite a final determination on the merits.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that the plaintiffs' first application for preliminary injunction [#1-1] is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that the Little Colorado River Authority's Motion to Intervene as a Plaintiff [#5b] is GRANTED;

IT IS FURTHER ORDERED that the Clerk of Court FILE the Lower Colorado River Authority's Original Complaint and Application for Preliminary Injunction;

IT IS FURTHER ORDERED that the motions to dismiss filed by Rodney Slater [#13-2] and Longhorn Partners Pipeline, L.P. [#28] are DENIED;

IT IS FURTHER ORDERED that the plaintiffs' amended application for preliminary injunction [#12-1], the City of Austin's application for preliminary injunction

[#55], and the Lower Colorado River Authority's application for preliminary injunction are GRANTED;

IT IS FURTHER ORDERED that Longhorn is henceforth enjoined from transporting any petroleum products in the Longhorn Pipeline until further order of this Court, the Fifth Circuit, or the United States Supreme Court; and

IT IS FINALLY ORDERED that the Department of Transportation and/or the Environmental Protection Agency shall conduct an environmental impact statement in accordance with the National Environmental Protection Act and Council on Environmental Quality regulations on the major Federal action involved in the construction and operation of the entire Longhorn Pipeline project.[25]

SIGNED on this the 25th day of August 1998.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT
JUDGE

[25] This order shall have no effect on the Army's pending determination on whether an EA or EIS should be conducted regarding the requested Fort Bliss easement.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ETHEL SPILLER, JOHN MOLESWORTH, LUCIEN COLLINS, MARIAN COLLINS, ROB ROY SPILLER, BARBARA SPILLER, HUGH SPILLER, and MARY SPILLER,	§	
Plaintiffs	§	
VS.	§	**NO. A 98 CA 255 SS**
ROBERT WALKER, FEDERAL ENERGY REGULATORY COMMISSION and its CHAIRMAN AND COMMISSIONERS, RODNEY SLATER, CAROL BROWNER, UNITED STATES, LONGHORN PARTNERS PIPELINE, L.P, and EXXON PIPELINE COMPANY,	§	
Defendants.	§	

ORDER

(Filed Sep. 25, 1998)

BE IT REMEMBERED that on the 21st day of September 1998, the Court held a hearing on all pending motions in the above-styled cause at which all parties appeared by counsel. The focus of the hearing was Longhorn Partners Pipeline, L.P.'s Motion for Reconsideration and Alternatively, for Clarification of Order and Stay Pending Appeal. After considering the arguments by

counsel, the briefs,[1] the case file, and the applicable law, the Court enters the following opinion and orders.

On August 25, 1998, this Court entered an order granting preliminary injunctive relief to the plaintiffs in the above-styled cause requiring the federal government to conduct an Environmental Impact Statement ("EIS") on the construction and operation of the Longhorn Pipeline and enjoining Longhorn Partners Pipeline, L.P. ("Longhorn") from placing refined petroleum products into the pipeline until the EIS is completed.[2] Longhorn has vehemently challenged that decision in the media and has also filed a billion-dollar lawsuit in the Texas District Court for the 120th Judicial District in El Paso, Texas, suing the plaintiffs' attorneys and a rival oil company for conspiring to orchestrate the "baseless" and "harassing and vexing" lawsuit in the above-styled cause.[3] Finally, Longhorn

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[1] Before the Court on the reconsideration issue are Defendant Longhorn Partners Pipeline, L.P.'s Motion for Reconsideration and Alternatively, for Clarification of Order and Stay of Preliminary Injunction Pending Appeal, the plaintiffs' response thereto, the Lower Colorado River Authority's ("LCRA") response thereto, and Longhorn's reply thereto. The plaintiffs' response to Longhorn's motion to reconsider incorporates by reference the plaintiffs' exhibits submitted with their motion for summary judgment.

[2] The Court incorporates by reference its order granting the preliminary injunction of August 25, 1998 for the factual and legal background and the basis of the Court's decision in that order.

[3] Ironically, Longhorn alleges in the El Paso lawsuit that plaintiffs' counsel has "misled" courts by failing to disclose Navajo Refining Company's involvement in financing litigation against Longhorn. On the contrary, plaintiffs' counsel readily admitted to the Court the unique symbiosis between an oil company and ranchers in the case before this Court. In contrast, Longhorn fails to disclose in its state-court petition that a federal court granted a preliminary injunction on the plaintiffs' "baseless," "harassing," and "vexing" claims six days

(Continued on following page)

challenges the decision in the proper manner, in the form of its motion to reconsider. Longhorn makes five basic arguments in its motion for reconsideration: (1) there is no major federal action; (2) the environment is not significantly affected, (3) the National Environmental Protection Act ("NEPA") has no logical application to this project, (4) NEPA does not permit an injunction against Longhorn, and (5) the public interest will not be served by an injunction.

I. Major Federal Action

Longhorn argues its pipeline will be privately owned and operated, and there is no involvement of any federal agencies that constitutes a cognizable major federal action for purposes of NEPA. As stated in the order granting the preliminary injunction, however, there are numerous federal actions that are necessary for the operation of the pipeline:

> The Army Corps must permit construction across the several navigable waters. The Army has been asked to grant an easement across federal lands at Fort Bliss. DOT has designated TRC to ensure Longhorn's compliance with the HLPSA. DOT has also established an inspection regime and carried out its inspection process, making efforts short of "bringing enforcement actions" to see that Longhorn complies. Finally, DOT is responsible

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before Longhorn filed its petition. Furthermore, Longhorn fails to indicate that the City of Austin and the Lower Colorado River Authority joined as plaintiff-intervenors in the "baseless" and "conspiratorial" case before this Court.

> for ensuring that Longhorn has an adequate emergency response plan in case a problem does occur. Additionally, Longhorn has pursued favorable rates from FERC, arguing beneficial rates based on the existing pipeline between Crane and Baytown will be good for the environment.

Order of August 25, 1998, at 30-31. Longhorn argues it could still run the pipeline without the Fort Bliss easement, which may be true; but it is clear no pipeline could run from the Gulf to El Paso without easements across navigable waters, DOT approval and regulation, and FERC ratemaking. Moreover, Longhorn re-urges its arguments that many of the federal actions involved are exempt for various reasons. These arguments have been considered and explained fully in the August 25 order. The Court found the EPA's responsibilities under the Clean Water Act exempt from NEPA consideration, but no other federal actions involved in this lawsuit are similarly exempt.

Longhorn argues the Court's logic in finding a major federal action in this case would require an EIS every time a federal agency changed transportation rates or conducted regulatory enforcement. However, the issue in this case is not the routine setting of rates and enforcement of regulations. This case is about a very non-routine event-the conversion of a fifty-year-old crude oil pipeline into an interstate, refined petroleum products pipeline, across environmentally sensitive areas, along a 748-mile route along which refined petroleum products have never been transported. The Court's order requires an EIS prior to the operation of this new refined petroleum pipeline, not that an EIS must be completed every time a DOT enforcement policy or FERC rate changes.

II. Significant Effects on the Environment.

Longhorn next argues the Longhorn Pipeline Project has no significant effect on the environment. This argument is based on Longhorn's position that the pipeline that would run near the plaintiffs' land has been in use for over fifty years and will merely be used to transport a different liquid in a different direction.[4] Refined petroleum products, however, are much different than crude oil. Contrary to Longhorn's "undisputed fact" asserting there is no material difference in the danger of a leak involving refined petroleum products versus crude oil, refined petroleum products could potentially cause much more damage in the event of a spill or small leak due to their higher liquidity (lower viscosity), volatility, water solubility, and content of carcinogens. Given that this fifty-year-old pipeline would be transporting a different substance posing a different environmental threat of "disputed" amount, the operation of the proposed Longhorn Pipeline certainly could have an effect on the environment. This is especially true with this particular pipeline, which had 175 reportable leaks between 1966 and 1994, some of which leaked thousands of barrels of crude oil.

The fact that the environmental effect is "significant" is not debatable. The pipeline will flow over 700 miles, pumping up to a quarter of a million barrels of refined

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[4] Longhorn urges the Court to consider only the 450-mile, 50-year-old existing pipeline because the new extensions will be remote geographically from the plaintiffs. However, without the new pipeline extensions, no refined petroleum products at all will pass near the plaintiffs' land. This is *one* pipeline project and will be analyzed in that manner. Moreover, even if the only issue were the 450 miles of existing pipeline, the Court's result would be the same.

petroleum products a day. It will cross the Colorado River and twelve of its tributaries and traverse the recharge zone of the Edwards Aquifer, which leads into the water supply for the City of Austin. The pipeline will run through eleven counties serviced by the LCRA and carry products near McKinney Falls State Park, Karst Nature Preserve, the Austin Greenbelt, and Barton Springs Pool. The pipeline will also carry refined petroleum products through residential neighborhoods in South Austin. Austin Fire Department's spill scenario suggests that a spill involving the Longhorn Pipeline in a developed area would spew 450 gallons of refined petroleum product per minute, cause house and brush fires, require the immediate evacuation of 200 to 780 residents, and require the efforts of over 100 firefighters. If these potential effects on the human environment are not "significant," it is hard to imagine what would be.

Longhorn argues its pipeline will be safe and will utilize high technology including safety valves, satellite information, and "smart pigs" to monitor the pipeline. The Court certainly hopes this is true. However, the purpose of NEPA is to have the federal government make a careful study of the potential environmental effects of a major federal action such as this and make sure that the agencies' policies are carried out in a safe and effective manner.

III. NEPA's Logical Application

Longhorn argues it would be futile to order the federal agencies to conduct an EIS in this case because there is no discretion any agency could exercise in response to the EIS. In fact, Longhorn argues that regardless of the results of the EIS, the federal government has no authority to block

operation of the pipeline. This argument suggests not only arrogance and defiance, but it also reveals a basic misunderstanding of the law. Longhorn argues blocking the pipeline would constitute an unconstitutional taking. That issue is not being litigated and has not been argued before the Court, but Longhorn's certainty about its position is not shared by the Court. *See Eastern Enters. v. Apfel,* 118 S. Ct. 2131, 2154 ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.") (quoting *Penn Central Transp. Co. v. New York City,* 98 S. Ct. 2646, 2659 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty") and *Kaiser Aetna v. United States,* 100 S.Ct. 383, 390 (1979) (the regulatory taking question requires an "essentially ad hoc, factual inquir[y]")). In short, it is nonsensical for Longhorn to argue that if an EIS revealed major, unresolvable threats to the human environment (such as to a major city's water supply), the federal government could do absolutely nothing to prevent Longhorn from sending approximately 200,000 barrels per day of refined petroleum products across the State of Texas.

The Court does not foresee that its injunction will lead to any action completely blocking the operation of the Longhorn Pipeline, especially if Longhorn is being as diligent about safety as it asserts. The purpose of a NEPA-required EIS is not to block major federal actions. In fact, NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Sabine River Auth. v. United States Dep't of the*

Interior, 951 F.2d 669, 676 (5th Cir. 1992). The information and analysis function of NEPA would have provided better information about potential problems with the pipeline to the EPA, DOT (through the Office of Pipeline Safety (OOPS")), the Army, and the Army Corps before they began undertaking major federal action, alone or in concert. Longhorn argues at this point in time the EIS would be useless. However, it is clear that OPS, for example, could use information gained from an EIS to help it determine the procedures, methods, schedules, and other details of inspections of the pipeline. Furthermore, this information may play a part in whether OPS decides to delegate its duties to the Texas Railroad Commission. Having more information about the pipeline and its possible strengths and weaknesses could only help OPS carry out its duty in ensuring the safety of the pipeline. In short, aside from the "no action" alternative that Longhorn eschews, there are other ways the EIS could benefit the decision making process of federal agencies engaged in the major federal action.[5]

IV. Injunction Against Longhorn

Longhorn tops its "the government can't stop us" argument only by arguing "the Court can't enjoin us." In Longhorn's perfect world, it would happily pump millions of barrels of oil through the pipeline while the governmental agencies conducted their EIS to determine (for the first

[5] Furthermore, information revealed in an EIS could still be beneficial to other agencies not involved in major federal action, but still involved in policies to protect the human environment such as the EPA and local fire departments.

time) the potential impact on the human environment of the pipeline. This Court clearly has authority under NEPA to enjoin Longhorn. *See Fritiofson v. Alexander,* 772 F.2d 1225, 1249 (5th Cir. 1985) (upholding the injunction preventing construction on a private project until deficiencies in an Environmental Assessment ("EA") were cured); *Biderman v. Morton,* 497 F.2d 1141, 1147 (2d Cir. 1974) ("[I]f NEPA is construed to mandate that the requisite agency decision be enlightened by and grounded on an EIS, it *is beyond cavil* that the court may then enjoin the non-federal actors pending completion of that impact statement.") (emphasis added); *Silva v. Romney,* 473 F.2d 287, 291-93 (1st Cir. 1973) (holding private developer should be enjoined from cutting trees or constructing a housing project pending the completion of the EIS).

Longhorn argues this authority only permits injunctions of private actors in cases involving joint actions involving federal and private actors. This argument is simply incorrect. The Fifth Circuit case, *Fritiofson,* deals with a private developer's plan to build a "venetian" housing development – "homes built along the shores of manmade canals." *Fritiofson*, 772 F.2d at 1227. The private developer, Mitchell, needed a permit from the Army Corps of Engineers before conducting excavation from navigable waters for the project. *Id.* at 1228. The district court held the Army Corps of Engineers violated NEPA by failing to consider the cumulative effects of the project in an EA that found no significant impact on the environment, and the court ordered (1) the completion of an EIS and (2) an injunction preventing work on the Mitchell project. *Id.* at 1232-33. On appeal, the Fifth Circuit held that the ordering of an EIS was not called for, but the injunction against Mitchell's construction was

upheld pending an EA that considered the cumulative effects. *Id.* at 1249 ("The injunction against work on the Mitchell project must, therefore, be continued until the project is adequately analyzed.").

The case law from other circuits also fails to support Longhorn's assertion that private actors can only be enjoined when acting in cooperative projects with federal agencies. *Biderman* states, "it is well settled that non-federal parties may be enjoined, pending completion of an EIS, where those non-federal entities have entered into a partnership or joint venture with the Federal Government, and are thus recipients of federal funding." *Biderman,* 497 F.2d at 1147. But this does not suggest that non-federal parties may *only* be enjoined under the partnership scenario. On the contrary, *Biderman* goes on to explain that in instances in which "non-federal action cannot lawfully begin or continue without the prior approval of a federal agency" it is "beyond cavil" that the non-federal action may be enjoined pending the completion of an EIS. *Id.* As stated above in the discussion of major federal action, there is no way the Longhorn Pipeline Project could "begin or continue" without the prior approval of several federal agencies. Therefore, according to the clear dicta in *Biderman,* the Court has power under NEPA to enjoin Longhorn's activities until an EIS is completed.

Longhorn's only argument that makes sense regarding the Court's power to enjoin it under NEPA is that a court cannot issue an injunction against a private party involved in a project that does not involve major federal action. Because the Court finds the federal agencies are involved in major federal action with regard to the Longhorn Pipeline Project, however, it is "beyond cavil" that the

Court has the power to enjoin Longhorn in enforcing NEPA.

V. Public Interest

Longhorn finally argues the public interest weighs against the Court's order granting the plaintiffs' motion for preliminary injunction. Longhorn focuses on higher gasoline prices in El Paso caused by a lack of competition in that market. However, economic consequences always follow when a project is delayed pursuant to an EIS. Longhorn has failed to show that the alleged marginal decrease in gasoline prices for a limited time would come close to balancing against the risk of a catastrophic oil spill. In explaining the significance of the effect the pipeline could have on the human environment in Part II, *supra,* the Court has explained why the public interest requires that the pipeline project proceed with caution. The Court's preliminary injunction merely preserves the status quo and prevents Longhorn from placing refined petroleum products in the pipeline until an EIS is completed. With diligence on the part of the federal agencies, Longhorn's alleged harm to the public interest of marginally higher gasoline prices will not last long. On the other hand, environmental damage caused by a spill within the pipeline could cause long-term, if not permanent, damage.

Furthermore, Longhorn has repeatedly asserted that the Court is causing economic harm to the citizens of El Paso by requiring an EIS prior to operation of the pipeline. However, the Court is merely following the intent of Congress. If Longhorn had not taken such dogged efforts to avoid an EIS, an injunction at this time would not be necessary; an EIS would have been completed; and the

federal agencies and the public would have obtained thorough and complete information on how to run the pipeline safely.

VI. Conclusion

Longhorn has failed to convince the Court that it should reconsider its order of August 25, 1998 granting the plaintiffs' motion for preliminary injunction or that the injunction should be stayed pending appeal. However, because the issues involved in this injunction are so important to all parties involved, the Court would encourage the Fifth Circuit to consider Longhorn's appeal in an expedited manner.

One final matter before the Court is the security on the preliminary injunction. Rule 65(c) of the Federal Rules of Civil Procedure provides as follows: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . . " Longhorn argues a bond in the amount of $500 million should be required for this injunction, because Longhorn estimates it will lose that amount in the first month operation of the pipeline is delayed. Moreover, Longhorn argues its competitor, Navajo Refining Company, is bankrolling the litigation and has agreed to cover any of the plaintiffs' costs. However, the Court refuses to set bond at such a high level because two of the plaintiffs are governmental entities representing the interests of thousands of citizens, and the costs of the bond would be passed on to the taxpayers. The individual plaintiffs are

private landowners asserting their rights under NEPA, regardless of who is or is not supporting them in the litigation. The Court does not wish to discourage individuals or government agencies from asserting meritorious claims to enforce NEPA by setting an oppressively high bond. Although the Court has discretion to set no bond, the security will nevertheless be set at $1,000.

IT IS ORDERED that LCRA's Motion for Protective Order [#68] is DENIED because it involves the Texas Public Information Act, a matter of state law separate and independent from this lawsuit;

IT IS FURTHER ORDERED that Longhorn's Motion for Expedited Response & Action [#74] is DISMISSED AS MOOT;

IT IS FURTHER ORDERED that Longhorn's Motion to Exceed Page Limit on Motion to Reconsider, Clarify, and/or Grant Stay Pending Appeal [#75] is GRANTED;

IT IS FURTHER ORDERED that Longhorn's Motion to Supplement [#78] is GRANTED;

IT IS FURTHER ORDERED that Longhorn's Motion for Reconsideration [#75-1] is DENIED;

IT IS FURTHER ORDERED that Longhorn's Motion to Clarify [#75-2] is GRANTED IN PART and DENIED IN PART as follows: the plaintiffs and/or intervenors shall post a bond of $1,000 in the Registry of the Court as security on the preliminary injunction ordered by this Court on August 25, 1998;

IT IS FURTHER ORDERED that Longhorn's Motion for Stay Pending Appeal [#75-3] is DENIED; and

IT IS FINALLY ORDERED that the defendants shall have until October 19, 1998 to respond to Plaintiffs' Motion for Summary Judgment [#82].

SIGNED on this the 24th day of September 1998.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50870

ETHEL SPILLER, ET AL,

Plaintiffs-Appellees,

versus

ROBERT M. WALKER, ET AL,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

(Filed Oct. 20, 1998)

Before HIGGINBOTHAM, BARKSDALE, and DENNIS, Circuit Judges.

BY THE COURT:

The application of Longhorn Partners Pipeline for stay of preliminary injunction pending appeal is DENIED.

CONFIDENTIAL SETTLEMENT DOCUMENT

MARCH 1, 1999

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Ethel Spiller, *et al.*	)	
Plaintiffs,	)	
v.	)	CIVIL NO. A-98-CA-255-SS
Robert M. Walker, *et al.*	)	
Defendants.	)	

SETTLEMENT STIPULATION

WHEREAS plaintiffs have filed complaints and motions for preliminary injunction to halt the construction and operation of the Longhorn Pipeline from the Gulf Coast of Texas to El Paso pending compliance by defendants with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321-4347;

WHEREAS the Court entered a preliminary injunction of August 25, 1998, finding a failure to comply with NEPA, directing defendants Department of Transportation ("DOT") or Environmental Protection Agency ("EPA") to prepare an environmental impact statement ("EIS") in accordance with NEPA, and enjoining defendant Longhorn Partners Pipeline, L.P., ("Longhorn") from transporting any petroleum products in the pipeline until further order of the Court or a higher court;

WHEREAS the Court denied reconsideration of the preliminary injunction by Order entered September 24, 1998; and

WHEREAS, the parties have agreed to a process under NEPA and the terms of this Stipulation for studying the environmental impacts of the Longhorn Pipeline Project as defined in Attachment B, Paragraph I.B.

WHEREAS the parties have engaged in detailed settlement negotiations and have reached an agreement.

NOW THEREFORE, the parties agree as follows:

1. Defendants EPA and DOT agree to prepare, as joint lead federal agencies ("lead agencies"), in accordance with this Settlement Stipulation and the Council on Environmental Quality ("CEQ") and other NEPA regulations and policy (e.g., 40 C.F.R. §1501.3(b), 63 Fed. Reg. 58045 (Oct. 29, 1998) (EPA's Policy for Voluntary Preparation of NEPA Documents)) an environmental assessment ("EA") of the Longhorn Pipeline Project (as defined in Paragraph I.B. of Attachment B). EPA shall be the lead agency for purposes of overseeing environmental impact analysis, e.g., Sections I and II of Attachment B and for the analyses and recommendations of Sections III.C.1.(a) and (b), III.B (Environmental Effects), III.C.2 and III.D. of Attachment B. DOT shall be the lead agency for purposes of overseeing pipeline safety and technology, e.g., Sections III.A., III.B. (Risk Assessment) and III.C.1.(c) of Attachment B.

2. The parties agree that the lead agencies may designate other federal, state and local agencies as cooperating agencies to assist in preparation of the EA; the cooperating agencies shall include at least the Department

of the Army. The lead agencies shall invite the U.S. Fish and Wildlife Service, and the City of Austin Fire Department to be cooperating agencies. The parties further agree that the City of Austin, or any other party, may request assistance in the process from the National Transportation Safety Board ("NTSB"). In the event that the City of Austin, or any other party, makes such a request, and the NTSB agrees, the Federal Defendants agree to consider, in the preparation of the EA any assistance, information or comments timely provided by the NTSB.

3. The parties agree that the lead agencies, after consultation with the nonfederal parties, shall select a contractor to prepare the EA and shall direct the contractor as provided in Attachment A.

4. Federal defendants agree that the EA shall include:

(a) an identification of the Longhorn Pipeline Project as described in Attachment B, Paragraph I.B.) and a description of the proposed agency actions;

(b) an identification of alternatives to the proposed actions, including the "no action" alternative and the rerouting alternative identified in Paragraph III.C.1.b.(ii) of Attachment B, and any appropriate and reasonable mitigation measures not included in proposed actions;

(c) a description of the affected environment, including environmentally sensitive areas, densely populated areas, and populated areas within the jurisdiction of the City of Austin, including: (i) the following City of Austin neighborhoods in proximity to the pipeline: Dove Springs, Meadow Creek, Texas Oaks, Buckingham Estates,

Tanglewood Forest, Cherry Creek, Village of Western Oaks, Silverstone, Southwest Oaks, Whispering Oaks, Woodstone Village, Cortina, Deer Park, Circle C, Matthews Lane, Maple Run #5, South Creeks, Onion Creek Plantation, Park Ridge, Park Wood, Salem Walk and Plantation Oaks and (ii) the following schools in proximity to the pipeline: Widen Elementary, Palm Elementary, Langford Elementary, Pleasant Hill Elementary, Bedichek Middle School, Williams Elementary, Kocurek Elementary, Boone Elementary, Hillcrest Elementary, Popham Elementary, Bowie High School, Kiker Elementary, Mills Elementary, Odom School, Kocurek Elementary, Bailey Middle School, Bowie High School and The Brown School;

(d) an analysis of the safety and environmental effects, including health effects, of the proposed actions and the reasonable alternatives, including a pipeline integrity analysis and risk assessment;

(e) consideration of relevant information submitted on a timely basis by the parties, cooperating agencies, or the public;

(f) other components, including those identified in Attachment B.

5. Federal defendants agree, except as provided alternatively in Paragraph 7, to publish in the *Federal Register* a notice of availability of the draft EA and any proposed EA Decision (as defined in Paragraph 7) for comment and to provide each nonfederal party with a copy of the notice, the draft EA and any proposed EA Decision. Federal defendants agree to provide in the notice for a 30-day comment period. Federal defendants agree to hold

public meetings in the Cities of Austin, El Paso, Houston and two cities designated by the Lower Colorado River Authority during such 30-day period and to announce the date and place of the meetings in the notice of availability of the draft EA and proposed EA Decision. The Lower Colorado River Authority shall designate such two cities on or before March 31, 1999.

6. Defendant lead agencies agree to work diligently with the cooperating agencies and any contractor selected by the lead agencies to complete the EA in accordance with the schedule set forth in Attachment C, provided that the lead agencies reserve the discretion to take such additional time as is necessary to satisfy the requirements of NEPA and implementing regulations and to fulfill and satisfy the scope of the contemplated EA as set out in Attachment B hereto and the requirements of this Stipulation. Longhorn agrees to exercise reasonable efforts to include in its agreement with the contractor selected by the lead agencies a provision requiring the contractor to maintain an office or other area available to the parties upon reasonable notice and during normal working hours in which documents and information supplied to the contractor shall be available for inspection and copying at the expense of the party requesting such inspection and copying, but excluding any information or materials that the lead agencies determine are agency deliberative documents not appropriate for public disclosure as part of the NEPA process. In order to facilitate this process, in the event that the contractor agrees to such a procedure, the parties agree that any documents and information provided to the contractor by the parties shall be produced in duplicate.

7. The parties agree that, after completion of the EA and the public hearings referenced in Paragraph 5, the lead and appropriate cooperating federal agencies will issue an "EA Decision" in accordance with NEPA regulations and policy and this Stipulation. An EA Decision is either a Finding of No Significant Impact ("FONSI") or a notice of intent to prepare an Environmental Impact Statement ("EIS"). The lead and appropriate cooperating federal agencies may, if appropriate, issue a notice of intent to prepare an EIS at any time during the preparation of the EA. If there is a notice of intent to prepare an EIS, federal defendants shall proceed in accordance with the CEQ and other NEPA regulations and EPA and DOT shall serve as joint lead agencies with responsibilities as agreed in Paragraph 1 of this Stipulation, while the cooperating and other agencies may participate as agreed in Paragraph 2 of this Stipulation. Such notice shall be issued in the *Federal Register*.

8. Federal defendants agree that a determination whether to issue the FONSI, in accordance with 40 C.F.R. §1508.13, shall take into account any appropriate and reasonable mitigation measures to prevent operation of the Longhorn pipeline from significantly affecting safety and the human environment, including health, and that issuance of any FONSI dependent on a mitigation measure or measures shall be conditioned on implementation of the measure or measures.

9. Unless authorized by further court order, or until at least 30 days after issuance of a FONSI, or until at least thirty (30) days after issuance of an EIS and Record of Decision ("ROD") if a FONSI is not issued,

(a) the Federal defendants agree that:

(i) the Research and Special Programs Administration of the Department of Transportation will not approve or allow Longhorn to commence operations under the Response Plan for the Longhorn Pipeline Project; provided that, in the event of a FONSI conditioned upon Longhorn's implementation of mitigation measures, the Department of Transportation will not approve or allow Longhorn to commence operations under the Response Plan until Longhorn has implemented the mitigation measures upon which the FONSI is conditioned and that are required to be implemented prior to or upon start up of the pipeline and the appropriate lead agency, as identified in Paragraph 1 of this Stipulation, has obtained reasonable evidence from Longhorn that such mitigation measures have been implemented, and

(ii) the Department of the Army will not issue a right-of-way for the pipeline across Ft. Bliss, and

(b) Longhorn agrees, without admitting that any such permit may be required, that it will not accept issuance of any permit under the Endangered Species Act of 1973, as amended (an "Endangered Species Permit"); provided, however, nothing herein shall be construed to either (i) prevent Longhorn from applying for and taking all steps necessary to obtain an Endangered Species Permit short of actually accepting issuance of the same, or (ii) applying for and accepting an Endangered Species Permit which is required in connection with the implementation of any mitigation measures upon which a FONSI issued under this Stipulation may be conditioned.

10. (a) Defendant Longhorn agrees that, until 30 days after issuance of an EA Decision, Longhorn will not transport or place any petroleum product in the pipeline, except that Longhorn may introduce petroleum products into the pipeline for purposes of maintenance, construction or testing if such maintenance, construction or testing is requested by the contractor in connection with the EA process and then only after obtaining approval of the Court and providing at least five (5) days written notice to the Office of Pipeline Safety in the Department of Transportation and all of the parties.

(b) Defendant Longhorn agrees not to commence any non-emergency stream crossing construction activity resulting in the discharge of dredged or fill materials into waters of the United States pursuant to a general or nationwide permit ("Stream Construction Activities") for a period of thirty (30) days after approval of this Stipulation by the Court. Nothing herein, however, is intended to preclude any challenge, on any basis, to any action under such permit or to the authorization granted to Longhorn under such permit.

(c) Defendant Longhorn agrees that, until thirty (30) days after issuance of an EA Decision, Longhorn will not commence any New Construction Activities (as hereinafter defined), or any Stream Construction Activities in any of the following described counties without providing written notice of such New Construction Activities or Stream Construction Activities ten (10) days prior to commencement of such construction, in the manner hereinafter provided. "New Construction Activities" mean any non-emergency construction activities involving the replacement, lowering or installation of pipe or any construction activities commenced after the date of this Stipulation

which involve the surface disturbance of one-half acre or more of land. The notice required and the parties to whom such notice is to be provided are as follows:

> (1) In the case of Stream Construction Activities across the Colorado River or any of its tributaries, Defendant Longhorn agrees to provide to the Lower Colorado River Authority as much advance written notice as is reasonably practical prior to commencement of construction, but in no event less than ten (10) days advance written notice of construction.
>
> (2) In the case of New Construction Activities in Travis, Hays, Caldwell, Bastrop, Kimble or Menard Counties, Longhorn agrees to provide as much advance written notice as is reasonably practical prior to commencement of construction, but in no event less than ten (10) days in advance, as follows:
>
> > (I) with respect to New Construction Activities on lands owned by Marian and Lucien Collins in Kimble and Menard Counties and with respect to New Construction Activities in Kimble and Menard Counties requiring the issuance of a new federal permit or authorization, written notice to counsel for Marian and Lucien Collins,
> >
> > (II) with respect to New Construction Activities on lands owned by David Robertson in Hays County and with respect to New Construction Activities in Hays County requiring a new federal permit of authorization, written notice to counsel for David Robertson;

(III) with respect to New Construction Activities in Travis, Hays, Caldwell and Bastrop Counties, written notice to counsel for Barton Springs-Edwards Aquifer Conservation District, and

(IV) with respect to New Construction Activities in Travis County, written notice to counsel for the City of Austin.

(d) With respect to any Stream Construction Activities and New Construction Activities, Longhorn agrees for the duration of the EA process, prior to commencement of such construction, that it will consult to minimize, to the extent reasonably practical, the environmental effects of such construction as follows:

(I) with respect to such Stream Construction Activities at stream crossings across the Colorado River or any of its tributaries, with the Lower Colorado River Authority;

(II) with respect to New Construction Activities identified in subparagraph (c)(2)(I), with Marian and Lucien Collins;

(III) with respect to New Construction Activities identified in subparagraph (c)(2)(II), with David Robertson; and

(IV) with respect to New Construction Activities in any of the counties identified in subparagraphs (c)(2)(III) and (c)(2)(IV), with the Plaintiffs described in such subparagraphs who have jurisdiction within such Counties.

(e) Defendant Longhorn agrees that any investment by Longhorn with respect to any construction in Kimble,

Menard, Hays, Travis, Caldwell, Bastrop and any counties within the jurisdiction of the Lower Colorado River Authority after August 25, 1998 shall not be considered for purposes of determining the reasonableness of alternatives. Nothing herein restricts the right of any party to seek appropriate relief from the Court or to take a different position with respect to investments other than those identified in the first sentence of this subparagraph (e).

11. The parties agree that, if the EA Decision is a FONSI, any party may apply to the Court to extend the Court's injunction contemplated by this Stipulation beyond the 30-day period following the issuance of the EA Decision on the ground that a FONSI issued under this Stipulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act, 5 U.S.C. §706, without limitation on any other remedies. The parties further agree that upon a finding by the Court that a FONSI issued under this Stipulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, the injunction may be extended upon such terms and conditions as may be imposed by the Court. Nothing in this paragraph shall prejudice the right of any party to appeal any decision of the Court or any finding relating to such decision.

12. The parties agree to this Stipulation for the purpose of efficient and effective resolution of this dispute and to avoid the risk, cost and delay incurred by continued litigation.

13. The parties agree that this Stipulation shall not constitute an admission of any violation of law or legal principle, nor does it constitute a waiver of any argument,

claim, or defense, whether jurisdictional or otherwise, involving the Longhorn Pipeline Project, nor does this Stipulation constitute an agreement that the Court's Orders heretofore entered are in any way improper or invalid. Further, the parties specifically reserve the right to contest or appeal any decisions or orders of the trial court entered after the issuance of the EA Decision and to bring any other claims under NEPA or any other statute.

14. The parties agree to file a Joint Motion with the Court in the form of Attachment D hereto (the "Parties' Joint Motion") under which the parties will request the Court to enter an Order in the form of Attachment E hereto (the "Agreed Order") approving the terms and conditions of this Stipulation.

15. The parties further agree that this Stipulation shall not be binding upon any of the parties hereto unless and until the Court has granted the Parties' Joint Motion and entered the Agreed Order. Longhorn and the Federal defendants agree to file a motion to dismiss their pending appeals with the U.S. Court of Appeals for the Fifth Circuit promptly, but in no event more than ten (10) days after the District Court has entered the Agreed Order.

16. The parties further agree that if a FONSI has not been issued within two hundred ten (210) days after entry of the Agreed Order, Longhorn may withdraw from this Stipulation by notice to the other parties and to the Court of such withdrawal. Longhorn's withdrawal from this Stipulation shall not affect Longhorn's continuing obligations to make payments to the Contractor for work performed on the EA pursuant to the budget previously established under the provisions of Paragraph 2 of Attachment A hereto. Additionally, Longhorn's withdrawal

from this Stipulation shall not affect Longhorn's continuing obligation to cooperate with the lead agencies and the Contractor in completing the EA; provided however, that Longhorn shall not have financial obligations after its withdrawal from this Stipulation except as set forth in the immediately preceding sentence.

17. The parties agree that the Court (the United States District Court for the Western District of Texas, Austin Division) should retain jurisdiction of this case.

IT IS SO AGREED AND STIPULATED.

Plaintiffs Marian Collins, Lucien Collins, David Robertson, and Barton Springs-Edwards Aquifer Conservation District:

By: /s/ Renea Hicks
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COUNSEL FOR LISTED PLAINTIFFS

Dated: 3/1/99

Plaintiff City of Austin:

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Dated: 3-1-99

Plaintiff Lower Colorado River Authority

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Dated: 3-1-99

Defendant Longhorn Partners Pipeline, L.P.

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Dated: March 1, 1999

Defendants Rodney Slater, Secretary, U.S. Dept. Of Transportation; Carol Browner, Administrator, Environmental Protection Agency; and Robert M. Walker, Acting Secretary, Department of the Army

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COUNSEL FOR LISTED FEDERAL DEFENDANTS

Dated: February 26, 1999

Attachment A to Settlement Stipulation

RETENTION OF CONTRACTOR TO PREPARE ENVIRONMENTAL ASSESSMENT

1. Contractor Selection.

(a) Lead agencies, after consultation with non-federal parties, shall select one or more contractors capable of preparing the EA, including preparation of pipeline integrity analysis, health, safety and environmental effects and risk analysis, and identification and analysis of alternatives.

(b) Contractor shall have experience and expertise in design, construction and operation of oil pipelines and environmental effects of such operations, and experience in preparation of NEPA documents.

(c) Contractor shall not have any financial or other interest in the outcome of the Longhorn Pipeline

Project and shall provide the lead agencies such financial interest statements and disclosures as may be required by EPA and CEQ policies and procedures.

2. Payment for Contractor. Contractor shall prepare a budget for the EA based upon the timing, scope and components of the analysis as set forth in the Settlement Stipulation and Attachment B (the "Agreed Analysis"). The budget prepared by the Contractor shall be based upon the Agreed Analysis and shall be subject to approval by Longhorn, which approval shall not be unreasonably withheld. If at any time, the Contractor determines that the actual cost of the EA is likely to exceed 110% of the amount budgeted therefor, the Contractor shall submit a revised budget to Longhorn for approval, which approval shall not be unreasonably withheld. Subject to the foregoing, Longhorn shall pay the reasonable expenses and fees of the Contractor so long as the assessments and analysis being performed by the Contractor are within the Agreed Analysis. Notwithstanding Longhorn's responsibility to compensate the Contractor in accordance with this paragraph, the Contractor shall report to and be supervised by the lead agencies.

3. Contact and Cooperation with Contractor.

(a) Communications with Contractor by any nonfederal party or others shall be coordinated through the lead agencies. Nothing herein shall prevent the nonfederal parties from cooperating with, responding to, or providing information to the Contractor on a timely basis, which timely information shall be given appropriate consideration by the lead agencies and incorporated into the EA record.

(b) Longhorn and plaintiffs shall cooperate with Contractor and assist in performance of such

tests and inspections as Contractor reasonably determines are necessary and appropriate to perform EA. Plaintiffs shall be provided an opportunity to be present during any such tests or inspections in which Longhorn is involved.

(c) Upon specific written request by the Mayor or City Council of the City of Austin, Texas, the federal defendants agree that the lead agencies shall organize and host a public information session in the City of Austin, with the participation of the Barton Springs-Edwards Aquifer Conservation District, within thirty (30) days after the date of such request, for the purpose of providing information to the public and receiving information from the public on issues related to environmental impacts in and around the Austin area and the areas within the jurisdiction of the Barton Springs-Edwards Aquifer Conservation District. As part of any such session, the lead agencies shall secure the attendance of the Contractor or its representative. The lead agencies shall provide all other parties to the Stipulation reasonable notice of the time and place of such session, and any such party which desires to do so shall have the opportunity to attend and participate in the session.

Attachment B to Settlement Stipulation

ENVIRONMENTAL ASSESSMENT

I. Scope.

A. The EA will include an examination of safety and environmental effects, including health effects, of operation of the Longhorn Pipeline Project, and alternatives, including the no action alternative and the rerouting

alternative identified in Paragraph III.C.1.b.(ii) of Attachment B, and reasonable and appropriate mitigation measures.

B. The Longhorn Pipeline Project is a privately owned pipeline planned to carry refined petroleum products from the GATX terminal in Houston, Texas, to El Paso, Texas, with connections to other interstate pipelines with markets in New Mexico, Arizona and Mexico. The volume of product transported in the pipeline is projected to range from an initial average rate of approximately 72,000 barrels per day to, at maximum capacity, an average rate of 225,000 barrels per day. Achievement of maximum capacity is expected to occur gradually over a period of approximately ten (10) years. The number of pumping stations on the pipeline is expected to increase from the present total of six to as many as eighteen, including one station roughly every fifty (50) miles between the existing Satsuma and Crane Stations and one additional station between Crane and El Paso. The actual volumes and type of products transported in the pipeline will be subject to market conditions.

II. Affected Environment.

A. Identification of Water Resources and Uses.

1. Surface water resources and uses downstream of pipeline, and

2. Ground water resources and uses in proximity to pipeline or otherwise hydrologically connected to water resources in proximity to the pipeline route,

a. Significant aquifers, including the Barton Springs segment and any other affected segments of the Edwards Aquifer,

Edwards Trinity Plateau Aquifer, Colorado River Alluvium, Carrizo-Wilcox Aquifer and the Gulf Coast Aquifer,

b. Depth from the surface and porosity of aquifers,

c. Karst features, and

d. Permeability and other characteristics of soil types affecting transmission to groundwater.

B. Identification of Land Resources and Uses.

1. Flood prone areas in proximity to pipeline,

2. Densely populated areas in proximity to pipeline and populated areas in the City of Austin's jurisdiction, including the neighborhood areas and schools identified in Paragraph 4(c) of the Settlement Stipulation,

3. Sensitive land uses (e.g., schools, hospitals, preserves) in proximity to pipeline, including proposed uses actually under permit, municipal authorization or approved bond on the date this Stipulation is approved by the Court,

4. Highly sensitive industrial facilities in proximity to pipeline (e.g., semiconductor industry), and

5. Other significant land uses in proximity to pipeline (e.g., transportation facilities, energy facilities), that could be affected by the pipeline.

C. Identification of Flora and Fauna.

1. Threatened and endangered species that may be affected by pipeline operation, and

2. Other species of concern in vicinity of the pipeline that may reasonably be expected to be affected by pipeline operation.

D. Identification of Recreational Resources, including public parks, preserves and natural resource laboratories, that may reasonably be expected to be affected by pipeline operation.

E. Identification of Cultural Resources which may reasonably be expected to be affected by pipeline operation.

III. Environmental Consequences.

A. Pipeline Integrity Analysis.

1. Evaluation whether the existing Longhorn pipeline, new facilities and testing of the pipeline have complied with governmental safety standards for operation of oil pipelines and are consistent with industry standards and sound engineering practice, including consideration of:

a. inspection and test records and test methods (e.g., cathodic protection tests, smart pig tests, depth of cover data, "fly-over" records, OPS inspections and audits, hydrostatic tests),

b. maintenance records,

c. leak history of the existing pipeline, including pin hole leaks, line ruptures, third party accidents,

d. aging effects on pipeline,

e. pipeline repairs (e.g., clamps, replaced sections),

f. sections of pipeline manufactured using low frequency ERW process,

g. block and check valve placement and spacing,

h. stability of river and creek crossings, including weld integrity, pipeline strength, depth of cover, characteristics of cover material, potential for washout, erosion threats to aerial supports, and

i. the products to be carried.

2. Evaluation whether Longhorn's proposed operational standards and procedures comply with governmental safety standards and are consistent with industry standards and sound engineering practices.

3. Evaluation of Longhorn spill/leak response plans and measures and determination whether such plans and measures comply with governmental regulations, industry standards and sound engineering practices, including examination of:

a. proposed leak detection system and procedures for shutdown of pipeline sections considering resources at risk and reasonably available and proven technologies,

b. shut down decision process and timing,

c. level and type of pipeline surveillance for pipeline sections considering resources at risk,

d. staffing and equipment for spill response plans considering resources at risk,

e. prevention and clean up standards and recovery plans considering resources at risk, including soil, surface water, groundwater, known karst aquifers, threatened and endangered species,

f. other components of OPA 90 Plan, and

g. adequacy of plans to prevent and contain damage from fires and explosions in populated areas and local government input in such plans.

4. Identification of any current governmental safety standards which are not being complied with by Longhorn and the corrective measures that need to be taken by Longhorn to comply with those governmental safety standards. Identification of any areas where Longhorn's facilities, testing, operational standards and procedures, and response measures identified in subparagraphs 1 through 3 above are not consistent with "industry standards" or "sound engineering practices." Any such identification shall specify the industry standards or sound engineering practices sufficient to reasonably protect safety and the environment, including health, that Longhorn has failed to meet, the appropriate and reasonable mitigation measures available to Longhorn to remedy any such failures and the anticipated benefit associated with each such mitigation measure.

5. Evaluation of whether Longhorn's and its operator's computers affecting the safety and operation of the pipeline are Y2K compliant.

B. Environmental Effects and Risk Assessment.

1. Analysis of safety and environmental consequences, including health consequences, of potential leaks from pipeline on water resources and uses, land resources and uses, flora and fauna resources, recreational resources, and cultural resources identified above as Affected Environment, including consideration of:

   a. characteristics of products to be transported in the pipeline, including physical and chemical properties and toxicity,

   b. potential hazards (e.g., fire, explosion, toxicity),

   c. most vulnerable points (e.g., stream crossings, pump stations, valves, construction areas),

   d. magnitude of hazards based on volume of product in the uncontrolled pipeline segment, pressure in the segment, time typically required to shut down pipeline and range of ambient temperatures,

   e. speed, extent, and effects of spread of a plume, considering further: (i) products the pipeline will carry, (ii) spill to Colorado River or tributary at low flow, average flow, and flood conditions, (iii) spill onto the ground with wet or dry antecedent soil conditions and high and low water table conditions, (iv) differing wind, temperature and other climactic variations,

   f. emergency response plans and procedures, including procedures for notification of releases, fires, explosions, or

other hazardous conditions and for deploying personnel and equipment,

g. availability and adequacy of qualified emergency preparedness agencies and services provided by Longhorn, including trained personnel, containment equipment, personal protection equipment, communications capabilities,

h. safety and environmental consequences, including health consequences, of location of the pipeline in densely populated areas,

i. age and use of the pipeline,

j. expected use of the pipeline, and

k. adequacy and risk of proposed safeguards to protect the pipeline from damage from third-party construction.

2. Performance of an overall risk assessment of the Longhorn Pipeline Project consistent with recognized professional risk assessment standards, including discounting the magnitude of potential adverse consequences by probability of their occurrence and taking into consideration mitigation measures (both preventive and responsive) that Longhorn has implemented or has agreed to implement.

3. Analysis, pursuant to EPA's NEPA Policy Statement of any environmental justice issues associated with operation of the Longhorn pipeline, including but not limited to any issues raised by the prices of fuels in El Paso, Texas and other markets in Texas and New Mexico to be served by Longhorn and

the location of the pipeline in certain residential areas.

C. Identification and Analysis of Alternatives.

1. Identification of range of alternatives, including:

a. "no action,"

b. rerouting alternatives:

(i) pipeline construction across Fort Bliss versus along state highway right-of-way and

(ii) pipeline construction around: populated areas in and around the City of Austin; the Edwards Aquifer; Edwards Trinity Plateau Aquifer; Colorado River Alluvium; Carrizo-Wilcox Aquifer; and Gulf Coast Aquifer,

c. pollution control alternatives:

(i) enhanced leak detection,

(ii) enhanced ground surveillance,

(iii) enhanced emergency response capability,

(iv) replacement of pipe sections with new or double-wall pipe,

(v) increased depth of buried sections,

(vi) additional block and/or check valves and remote operation capability, berms or other containment for sections or facilities,

(vii) any other mitigation measures identified in Paragraph III.A.4.

2. Lead agencies, after consultation with other parties, shall consider a range of alternatives, including mitigation alternatives such as rerouting the pipeline as described in Paragraph 1.b.(ii), explaining reasons why any alternatives identified under Paragraph 1 are selected or eliminated from detailed study. The lead agencies will evaluate in detail those alternatives that are determined to be reasonable means of mitigating significant environmental impacts. Such analysis shall be in accordance with CEQ and other NEPA regulations and shall explain why any alternatives identified in Paragraph 1 are selected or eliminated from study. The time limits for completion of the EA shall not constitute a ground for elimination of any alternative identified in Paragraph 1 from detailed study.

D. Focus of Analysis. Analysis of safety and environmental consequences, including health consequences, of operation of the pipeline and alternatives shall include the entire Longhorn Pipeline Project with particular focus on potential effects from operation of portions of the Longhorn pipeline within the Barton Spring segment and any other segment of the Edwards Aquifer, the Edwards Trinity Plateau Aquifer, the Colorado River Alluvium, the Carrizo-Wilcox Aquifer and the Gulf Coast Aquifer, and at the crossings of the lower Colorado River and its twelve tributaries as designated by the Lower Colorado River Authority and areas within the jurisdiction of the City of Austin which are in proximity to the pipeline or

that could reasonably be expected to be affected by the operation of the pipeline.

Attachment C to Settlement Stipulation

SCHEDULE FOR COMPLETING ENVIRONMENTAL ASSESSMENT

1. The EA process shall commence immediately upon Court approval of Settlement. Any party shall have the right to terminate the Stipulation if the Court does not approve the Settlement on or before March 12, 1999.

2. Lead agencies shall complete identification and retention of Contractor within two (2) weeks after Court approval of the Settlement Stipulation and the Contractor shall prepare the budget for submission to Longhorn accordance with Paragraph 2 of Attachment A within two (2) weeks after its retention.

3. The Contractor shall endeavor to complete work on the proposed draft EA within one hundred twenty (120) days after the approval of the Stipulation by the Court; provided that if the Contractor has been retained and has commenced work on the EA prior to Court approval of the Settlement Stipulation, then Contractor shall endeavor to complete its work on the proposed draft EA on or before June 8, 1999. After completion of proposed draft EA, lead agencies shall promptly conduct review in consultation with other federal defendants and direct any revisions, additions or modification.

4. Lead agencies shall publish notice of availability of draft EA for comment within five (5) weeks of its receipt from Contractor and shall provide each nonfederal party with copy of notice and draft EA at least three (3) days prior to the date the notice of availability of the draft EA is

published. Notice of availability shall also announce public meetings on draft EA as provided in the Settlement Stipulation.

5. Lead agencies shall allow thirty (30) days for written comments and public meetings on draft EA as provided in Settlement Stipulation.

6. The Contractor shall prepare the final EA for lead agencies' approval as soon as practical after the close of the public comment period, but in no event more than thirty (30) days after the close of the public comment period.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Ethel Spiller, et al.	)	
Plaintiffs,	)	
v.	)	CIVIL NO. A-98-CA-255-SS
Robert M. Walker, et al.	)	
Defendants.	)	

AGREED ORDER

(Filed Mar 5, 1999)

The parties have submitted a Joint Motion and a Settlement Stipulation which explain that the Environmental Protection Agency and the Department of Transportation have agreed to prepare an environmental assessment (EA) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, on the Longhorn Pipeline Project. As explained, the two agencies will rely on one or more cooperating agencies, including the Department of the Army. As further explained, the appropriate agencies will then issue an "EA Decision," either a Finding of No Significant Impact (FONSI) or a notice of intent to prepare an Environmental Impact Statement (EIS) under NEPA.

The parties agree that as described more fully in the Stipulation, until 30 days after this process is completed, Longhorn Pipeline Partners, L.P., will not transport petroleum products through the pipeline.

In view of these and other agreements set forth in detail in the Stipulation, it is hereby ORDERED that:

1. Until 30 days after issuance of an EA Decision (but in no event prior to (i) Longhorn's implementation of any mitigation measures upon which a FONSI may be conditioned and that are required to be implemented prior to or upon start up the pipeline, and (ii) the appropriate lead agency, as identified in Paragraph 1 of the Stipulation, obtaining reasonable evidence from Longhorn that such mitigation measures have been implemented), Longhorn shall not transport or place any petroleum product in the pipeline, except that Longhorn may introduce petroleum products into the pipeline for purposes of maintenance, construction or testing if such maintenance, construction or testing is requested by the contractor in connection with the EA process, and then only after obtaining approval of the Court and providing at least five (5) days written notice to the Office of Pipeline Safety in the Department of Transportation, and all of the parties.

2. If the EA Decision is a FONSI, any plaintiff may apply to the Court to extend the injunction in Paragraph 1 beyond the 30-day period following the issuance of the EA Decision on the ground that the FONSI is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the Administrative Procedure Act, 5 U.S.C. §706, without limitation on any other remedies.

3. The preliminary injunction and reconsideration orders previously entered in this action are VACATED, and

4. All further proceedings in this action (except as otherwise provided in the Stipulation and in Paragraph 6 hereof) are STAYED until the earlier of –

(a) the election of Longhorn to withdraw from the provisions of the Stipulation pursuant to the provisions of Paragraph 16 thereof; or

(b) thirty (30) days after the issuance of an EA Decision.

If the EA Decision is a FONSI, the Plaintiffs shall have the right to apply to the Court for relief as provided in Paragraph 11 of the Stipulation.

5. It is further ORDERED that if (a) the lead agencies issue a notice of intent to prepare an Environmental Impact Statement ("EIS"), or (b) Longhorn elects to withdraw from the Stipulation pursuant to Paragraph 16 thereof, an injunction shall be issued effective immediately upon the occurrence of either of such events without further action of the Court, enjoining Longhorn from transporting or placing refined petroleum products in the pipeline until thirty (30) days after the completion of an EIS and ROD or until further order of the Court, except that Longhorn may introduce petroleum products into the pipeline for purposes of maintenance, construction or testing if such maintenance, construction or testing is requested by the contractor in connection with the EIS process and then only after obtaining prior approval of the Court and after providing five (5) days written notice to the Office of Pipeline Safety in the Department of Transportation, and all of the parties.

6. Pending final disposition of this case or further order of the Court, this Court retains jurisdiction of this case. Nothing in the stay referred to in Paragraph 4 of this Order shall preclude the Court from entering an order of the type referred to in the second paragraph of page 5 of the Order entered on January 19, 1999, in the case styled

Longhorn Partners Pipeline, L.P. v. Holly Corporation, et al., Cause No. EP 98 CA 406 SS (W.D.Tex., El Paso Div.)

Signed this the 5th day of March 1999.

/s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

[LOGO] **UNITED STATES ENVIRONMENTAL** [LOGO]
PROTECTION AGENCY

UNITED STATES DEPARTMENT
OF TRANSPORTATION

Jul. 17, 2000

Mr. George T. Frampton, Jr.
Acting Chair
Council on Environmental Quality
Executive Office of the President
Room 360 Old Executive Office Building
Washington, D.C. 20503

Dear Mr. Frampton:

The Environmental Protection Agency (EPA) and the Department of Transportation (DOT), as joint lead agencies under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.*, have reached an impasse on how to conclude the NEPA process for the proposed refined petroleum product pipeline owned by the Longhorn Pipeline Partners, LLP. In light of CEQ's authority to promulgate the regulations binding on all federal agencies to implement the procedural requirements of NEPA, to review federal agencies' activities for consistency with NEPA, and the U.S. Supreme Court's recognition of CEQ's authority to interpret the Act, we request your recommendation.

This matter arises in connection with a NEPA lawsuit brought by private landowners, the City of Austin, and others, titled *Spiller v. Walker* No. A 98 CA 255 SS (W.D. Tex.) which challenged the NEPA compliance for the pipeline. The district court issued a preliminary injunction and held that our agencies (as well as other federal agencies) were obligated to comply with NEPA before the

pipeline could operate. Although federal law does not provide our agencies with responsibility for licensing of refined products pipelines of this kind, DOT is required to approve facilities response plans for such pipelines pursuant to the Oil Pollution Act, a mandatory approval that we agree constitutes an action under NEPA. Although EPA's actions in this matter are statutorily exempted from NEPA, EPA agreed to serve as joint lead agency along with DOT to prepare a comprehensive environmental assessment pursuant to EPA's voluntary NEPA policy and as part of a partial settlement of the *Spiller* litigation.

Since the environmental review process commenced in March 1999, our two agencies have worked cooperatively with each other, with the project proponent, and with numerous federal, sate, and local agencies and groups. The lead agencies have also held public meetings in communities along the pipeline route and have received and analyzed voluminous written comments from the public. This process has resulted in a comprehensive environmental analysis, including a detailed plan for mitigating potential adverse environmental impacts from pipeline operations, which is set forth in the documents provided for your consideration. The lead agencies both believe that the mitigation plan, of a scope and rigor unprecedented in the pipeline industry, clearly provides a very substantial benefit for the public, and would secure an added degree of protection against the environmental risks associated with petroleum product pipelines.

Despite the enormous progress we have made, and despite our shared view that the mitigation measures reduce the environmental risks associated with the pipeline, we have a difference of view with respect to whether a Finding of No Significant Impact (FONSI) or an Environmental

Impact Statement (EIS) should be prepared to conclude the NEPA process. In light of the impasse, and given the novel and difficult issues raised by applying NEPA in this present context, we have agreed to seek your recommendation. The Department of Justice has advised us that, on the present state of the record, it could defend either a FONSI or an EIS, and that the choice is a policy choice for our two agencies.

Sincerely,

/s/	/s/
W. Michael McCabe	Mortimer Downey
Acting Deputy Administrator	Deputy Secretary
U.S. Environmental Protection Agency	U.S. Department of Transportation

[LOGO] EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON
ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

September 7, 2000

Mr. W. Michael McCabe
Deputy Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Mr. Mortimer Downey
Deputy Secretary
U.S. Department of Transportation
400 Seventh Street, SW
Washington, D.C. 20590

Dear Mr. McCabe and Mr. Downey:

On July 17, 2000, you requested the Council on Environmental Quality's guidance and recommendation on a strategy to conclude the National Environmental Policy Act (NEPA) process for the Longhorn Partners Pipeline (LPP) proposal for a refined petroleum products pipeline in Texas. We have studied this matter extensively and reviewed the issues raised by the public and addressed in the current draft analysis including the very extensive mitigation and safety proposals put forth by LPP. We have also considered the risk modeling you have performed on these proposals and the analysis and judgments reached based in part on that modeling. In addition to the extensive review by my staff, I have personally reviewed the draft Environmental Assessment (EA) and various appendices to the EA, as well as other relevant documents such as the 1987 Final Supplemental Environmental Impact-Statement (EIS) for the All American Pipeline. I have also met personally with you and your

staff on several occasions to receive a thorough briefing on your views. Since July, the studies and Endangered Species Act consultation have progressed and now indicate that the environmental effects will not be significant.

Based on our review, I recommend that you now promptly finalize the EA and prepare a Finding of No Significant Impact (FONSI), contingent upon (1) not discovering any significant environmental impacts in the finalization of the EA and underlying studies, and (2) successful conclusion of consultation with the U.S. Fish & Wildlife Service under the Endangered Species Act. I understand this process can be brought to completion in the next four to six weeks.

I recommend you finish the EA and prepare a FONSI for two reasons. First, the various provisions of the proposed Longhorn Mitigation Plan that will become a condition of the pipeline's operation, taken together, are unprecedented and they reduce the probability of a spill to a minimum and render impacts to the environment insignificant. These provisions include the relatively recent additions of a commitment not to transport any product blended with "MTBE" and additional provisions for new pipe and trenching to further reduce the possibility and impact of any spill to the Edwards Aquifer. This mitigation plan includes replacing existing pipe in certain sensitive areas, monitoring, pressure testing, installation of leak detection systems, aerial monitoring, limiting pressures in sensitive areas, periodic public reporting, and a System Integrity Plan to detect address future changes in risk and adapt new technologies.

Your agencies have used multiple approaches to assess the probability of a spill – and they all support the

conclusion that the risk is extremely low. These approaches include: (1) a relative risk assessment model of a type widely used and accepted in the industry; (2) engineering analysis of the residual risk from the four principal causes of pipeline failure; (3) an estimate of the absolute residual risk of a spill; (4) comparisons to similar pipeline operations; and (5) the best professional judgment of the Office of Pipeline Safety (OPS), and pipeline experts working with the lead agencies. It is probably true that given current technology, no hazardous liquids pipeline can be rendered spill-proof or that the possible impact on water bodies, wetlands, or nearby communities over the projected life of the pipeline can be reduced to zero. Nevertheless, all the risk assessment approaches support the conclusion that the Longhorn Mitigation Plan will reduce the probability of a spill to a minimum and that the threat to the environment is insignificant based on the extensive mitigation measures being implemented. This mitigation plan not only exceeds existing industry standards and regulatory requirements, but also meets and probably exceeds even proposals now being aired or advanced in Congress and elsewhere for possible future pipeline safety regimes. Based on this extraordinary mitigation plan, I am convinced that the pipeline would not have a "significant" impact on the environment as defined in NEPA.

Second, it is clear that the underlying purposes and policies of NEPA as well as the letter of the law have been well-served here by the preparation of this particular EA and by the process that has brought it to near-completion. In preparation for nearly a year and a half, this EA is comparable to an EIS. It exceeds the length and mirrors the format of a typical EIS. Public participation, including an extensive public review and comment period and six

public meetings, has been equivalent to that which would have been provided by an EIS. As a result of over 6,000 public comments and public hearings, additional studies and analyses were conducted to address additional issues raised. Intense negotiations between the proponent of the project and federal agencies on the mitigation plan in order to support a reduction of projected risk to an insignificant level have occurred, with concomitant protection for the environment. Extensive "alternatives analysis" has been conducted, required in an EIS but not customarily found in EAs. (For example, analysis of an "Austin reroute" alternative was conducted to address concerns raised by the City of Austin relating to potential risks to suburban neighborhoods; it showed that by reducing risks to existing populated areas, additional risk would be incurred to aquifers and drinking water and protected species, and projected future growth could still bring suburbs to the pipeline reroute.)

While no formal public "scoping" was conducted prior to the EA's commencement, it appears that the litigation and settlement agreement containing detailed stipulations about what the EA must contain were at least as extensive as any public scoping could have been, and probably were more proscriptive and comprehensive. Furthermore, a thirty-day period is required after the final EA and FONSI are published before a final decision can be made by OPS approving Longhorn's response plan – typical of an EIS, not of an EA. Finally, Longhorn must demonstrate that it has put its mitigation plan into effect before OPS can approve the response plan and Longhorn can commence operations.

Moreover, the analysis conducted here is based on an enhanced relative risk assessment model and an experimental probabilistic risk model, which divided the pipeline

route into approximately 8,000 segments, categorized their relatively sensitivity, and estimated risk based on the best available information. The analysis of how much the mitigation plan would reduce the risk of spill in each segment and the adoption of mitigation measures based on that analysis represents a new dimension in pipeline safety review.

In short, virtually nothing could be gained in terms of useful environmental information or analysis by "redoing" this extensive document as an EIS, other than sheer delay.

In summary, I am convinced that the purposes of NEPA and the interests of protecting the environment have been well served by this process, and that the process should be completed forthwith, contingent upon the conditions set forth above. Please let me know immediately if you think a time deadline of mid-October cannot be achieved for completion of the underlying studies, ESA consultation, finalization of the EA, and publication of the FONSI.

Sincerely

/s/ George T. Frampton, Jr.
George T. Frampton, Jr.
Chair

GTF/dss

(2)

No. 03-1428

Supreme Court, U.S.
FILED
MAR 14 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF AUSTIN, MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, and DAVID ROBERTSON,

Petitioners,

v.

NORMAN MINETA, Secretary of Transportation, MIKE LEAVITT, Administrator of Environmental Protection Agency, LES BROWNLEE, Acting Secretary of the Army, THE UNITED STATES, and LONGHORN PARTNERS PIPELINE, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT LONGHORN PARTNERS PIPELINE, L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court should overturn the Fifth Circuit's correct use of the only standard of judicial review applicable to the Longhorn FONSI (the APA's "arbitrary and capricious standard") and create a new standard of judicial review applicable to FONSIs alone.

2. Whether this Court should turn NEPA on its head by effectively outlawing the well accepted, environmentally preferable use of "mitigated FONSIs" simply because Petitioners did not like the result below.

RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties. Respondent Longhorn Partners Pipeline, L.P., is a Delaware limited partnership. There is no parent corporation or publicly held company owning 10% or more of the stock of Longhorn Partners Pipeline, L.P.

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STATEMENT OF THE CASE

Respondent hereby incorporates by reference as if fully set forth herein the Factual and Procedural History of this case set forth at pages 5-9 of the Fifth Circuit's opinion. App. 5a-9a.

PRELIMINARY STATEMENT

Because they are dissatisfied with the outcome of the Longhorn EA and FONSI which were upheld by the decisions below, Petitioners ask two things of the Court: (1) to rewrite the APA by creating a special subcategory of judicial review for mitigated FONSIs alone (in place of the arbitrary and capricious standard); and (2) to rule that mitigation measures cannot be used in an environmental assessment to reduce potential environmental impacts to insignificance.

Petitioners' first request would have this Court cast aside the APA and its own precedent to create a brand new standard of judicial review applicable only to mitigated FONSIs. Although the Petition never once articulates what this proposed new standard of judicial review should be, one thing is clear: Petitioners' real objective in this case is stopping this pipeline project, APA and precedent notwithstanding. Both the district court and the Fifth Circuit recognized the result-oriented nature of

Petitioners' challenge to the Longhorn FONSI.[1] Both properly rejected it, and so should this Court.

Petitioners' second request would require the Court to ignore CEQ's specific guidance and interpretation of NEPA in connection with the Longhorn project, overturn countless lower court decisions upholding mitigated FONSIs, and legislate a FONSI-specific prohibition into NEPA's existing text. This request lacks any legal foundation and must also be denied.

REASONS THE PETITION SHOULD BE DENIED

I. This case does not involve an "important question of federal law"

A. The Fifth Circuit applied the only standard of review there is – the "arbitrary and capricious" standard of the APA and *Marsh*

Petitioners concede that the Fifth Circuit followed the APA and this Court's precedent in using the "arbitrary and capricious" standard to review the Longhorn FONSI. Pet. at 9; *see* 5 U.S.C. § 706(2)(A); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Marsh v. Oregon*

[1] As noted by the Fifth Circuit, "Herein lies the problem for the Collins plaintiffs. They really don't want more process. Indeed, considering the extensive and comprehensive nature of the EA conducted here, it is unclear exactly what more process would involve. What they really desire is a substantive result: . . . the Collins plaintiffs want this pipeline project killed." App. 18a-19a. Similarly, the trial court observed that "Plaintiffs did not get what they really wanted, which was to stop the Pipeline, but that simply wasn't in the cards dealt by the United States Congress." App. 65a.

Natural Res. Council, 490 U.S. 360 (1989). Undaunted, Petitioners nonetheless argue that a different standard of review should be used for mitigated FONSIs than that used by this Court to review "mitigated EISs" in *Methow Valley* and *Marsh*. Pet. at 9. In making this argument, Petitioners offer only the insupportable claim (addressed below in I.B) that the basic concept of the "mitigated FONSI" – which has been upheld by every federal court to address it – violates the procedural mandates of NEPA.

There is absolutely no legal support for creating a new standard of review simply because Petitioners dislike their result under the existing one. In *Marsh*, this Court held that the arbitrary and capricious standard applied to a decision not to prepare a supplemental EIS. *Marsh,* 490 U.S. at 376. The *Marsh* Court expressly analogized that type of decision to the decision whether to conduct an EIS or, instead, issue a FONSI in the first instance, thus implicitly recognizing the standard's application to a FONSI decision. *Id.* at 374, *cited in National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).[2] Because it involves "primarily issues of fact" involving a high level of technical expertise, a FONSI – like a supplemental EIS determination – requires deference to "the informed discretion of the responsible federal agencies" under the arbitrary and capricious standard. *See id.* at 377.

Petitioners would have this Court disregard the APA's clear directive, its own precedent, and the uniform

[2] The Petition wrongly claims that the Second Circuit applied a different standard of review in *Hoffman* and thus created a circuit conflict with the Fifth Circuit. That claim is addressed *infra*.

lower-court progeny of *Marsh* to second-guess the Lead Agencies' scientific conclusions and CEQ's guidance simply because Petitioners – as recognized by both lower courts – did not like the outcome of the Longhorn EA process. Such result-oriented criticisms uniformly fail in NEPA reviews. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-28 (1980); *Society Hill Towers Owners' Ass'n v. Rendell,* 210 F.3d 168, 183 (3d Cir. 2000); *Brenham Cmty. Protective Ass'n v. United States Dep't of Agric.,* 893 F. Supp. 652, 657 (W.D. Tex. 1995), *aff'd,* 95 F.3d 49 (5th Cir. 1996).

B. Mitigated FONSIs are unquestionably permissible under NEPA

Petitioners specifically agreed in the Settlement Stipulation that mitigation measures should be considered and that a mitigated FONSI was a likely outcome. App. 161a.[3] Yet the bulk of the Petition is dedicated to attacking the general concept of mitigated FONSIs, which Petitioners variously portray as extra-legal "creatures of bureaucratic invention" (Pet. 9, 14), a "widely employed backdoor

[3] Attachment B, Section III.B.2 of the Settlement Stipulation required the "[p]erformance of an overall risk assessment of the Longhorn Pipeline Project consistent with professional risk assessment standards, including discounting the magnitude of potential adverse consequences by the probability of their occurrence and ***taking into consideration mitigation measures*** (both preventive and responsive) that Longhorn has implemented or has agreed to implement." App. 180a; R. 26:6605 (emphasis supplied). The Fifth Circuit specifically noted this agreement by Petitioners in dismissing their objections to "the mitigated nature of FONSI issued here." App. 11a.

mechanism" (Pet. 11), and a "below-the-judicial-radar-screen creation" (Pet. 14)[4] of federal agencies seeking to avoid NEPA's procedural mandates.

Contrary to Petitioners' colorful but misplaced descriptors, mitigated FONSIs are not only permissible under NEPA and routinely upheld by the federal courts, but have been deemed (by a scholar cited by Petitioners themselves) an environmentally preferable alternative to the "typically costly, cumbersome, and largely uninformative" mechanism of an EIS.[5]

i. Mitigated FONSIs are routinely upheld under NEPA

NEPA directs agencies to prepare an EIS for major federal actions that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(C).[6] Agencies may

---

[4] This characterization is particularly disingenuous: If mitigated FONSIs flew "below-the-judicial-radar-screen," as Petitioners claim, these proceedings would not be happening.

[5] Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 908, 935 (2002). Petitioners inexplicably cite this article to support their argument for outlawing mitigated FONSIs. A more extended discussion of Professor Karkkainen's article is found *infra*.

[6] Specifically, the law requires that agencies shall:

> [I]nclude in every recommendation or report on proposals for legislation and other major federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(Continued on following page)

also prepare an EA to assist them in determining whether or not an action will have a significant effect. 40 C.F.R. § 1508.9. If an agency prepares an EA, it may issue a FONSI if the action inherently has no significant impact on the environment, or if mitigation measures are adopted to reduce potentially significant impacts to a level of "insignificance." Such "mitigated FONSIs" are routinely upheld. *See, e.g., Louisiana v. Lee,* 758 F.2d 1081, 1083 (5th Cir. 1985), *cert. denied,* 475 U.S. 1044 (1986) (*citing Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson,* 685 F.2d 678 (D.C. Cir. 1982)); *see also Sierra Club v. DOT,* 753 F.2d 120, 129 (D.C. Cir. 1985); *C.A.R.E. NOW, Inc. v. FAA,* 844 F.2d 1569, 1575 (11th Cir. 1988) (holding that consideration of "mitigation measures [is] not only appropriate, it is required."), *reh'g denied,* 854 F.2d 132 (11th Cir. 1988); *Akiak Native Cmty. v. United States Postal Serv.*, 213 F.3d 1140, 1147 (9th Cir. 2000); *Roanoke River Basin Ass'n v. Houston*, 940 F.2d 58, 62 (4th Cir. 1991); *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992).

The Longhorn FONSI easily satisfies the requirements of a valid mitigated FONSI. It is based on the Longhorn EA, which contains 40 specific mitigation measures that reflect significant input from the Lead

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(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

42 U.S.C. § 4332(C).

Agencies, United States Fish & Wildlife Service ("FWS") and the public. The Lead Agencies determined that Longhorn's slate of mitigation measures: (1) "should render Longhorn's pipeline among the safest in the nation and dramatically safer than the minimum regulatory threshold established by OPS regulations," App. 84a; (2) "produce a set of conditions that have no known precedent in the pipeline industry," App. 84a, R. 30:7565; and (3) reduced pre-mitigation risk levels for the pipeline more than twenty-fold. R. 25:6166a.

ii. The Longhorn mitigation measures are fully enforceable

In examining mitigated FONSIs, courts in some cases have paid particular attention to the enforceability of mitigation measures, rejecting mere voluntary measures. *See, e.g., Pres. Council, Inc. v. Pierce,* 667 F.2d 851, 860 (9th Cir. 1982) (mitigation measures "must be more than mere vague statements of good intention"); *Hoffman*, 132 F.3d at 17 ("When the adequacy of proposed mitigation measures is supported by substantial evidence, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS.").

Notably, however, a finalized mitigation plan like the extensive one agreed to by Longhorn is not required for a mitigated FONSI to be upheld. *See Robertson*, 490 U.S. at 352, 359 ("It would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act . . . NEPA does not require a fully

developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts." *Wetlands Action Network v. United States Corps of Eng'rs*, 222 F.3d 1105, 1122 (9th Cir. 2000) (relying on *Robertson* to uphold mitigated FONSI issued by Corps of Engineers, though mitigation measures were not final), *cert. denied,* 534 U.S. 815 (2001).[7]

As recognized at page 20 of the trial court's Order, App. 42a, Longhorn's mitigation commitments are legally enforceable by OPS because they were incorporated into Longhorn's operations and maintenance manual, to which Longhorn must adhere under DOT regulations. 49 C.F.R. § 195.401(a).[8] Further, Longhorn has committed not to modify its mitigation measures or operating procedures without first publishing its intent to do so on its web site and obtaining the written approval of the Office of Pipeline Safety for any such changes. App. 42a; R. 26:6564. This is a restriction upon Longhorn's operating control that is not placed upon any other pipeline in the country. *Id.* The Lead Agencies took these mitigation measures and their undisputed enforceability into consideration in

[7] The Ninth Circuit in *Wetlands Action Network* also noted that "the fact that the record also contains evidence supporting a different scientific opinion does not render the agency's decision [to issue a mitigated FONSI] arbitrary and capricious." 222 F.3d at 1120-21; *see also Akiak*, 213 F.3d 1140 (9th Cir. 2000) (upholding mitigated FONSI), and *City of Auburn v. Surface Transp. Bd.*, 154 F.3d 1025 (9th Cir. 1998) (same), *cert. denied*, 527 U.S. 1022 (1999).

[8] The FONSI also notes that Longhorn's mitigation commitments are enforceable by the OPS under its continuing approval authority in 49 C.F.R. Part 194. App. 95a, n.11.

finding that operation of the pipeline will not have a significant impact on the environment.

iii. CEQ authorizes mitigated FONSIs in general

Recent statements and studies by CEQ and the NEPA Task Force affirmatively validate the use of mitigation measures to reduce a project's impacts to insignificance.[9] Ignoring these governing policy statements, Petitioners disingenuously claim that CEQ "rejects the basic concept of mitigated FONSIs – at least insofar as they are used to avoid EISs by adding mitigation measures to bring a project's impacts below the significance threshold." Pet. 10.[10] In support of this claim, Petitioners offer this Court only two outdated and indirect statements from CEQ in the 1980s.

The first is CEQ's answer to "Most Asked Question No. 40" of 1981, which concerned the effect of "possible"

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[9] *See* The NEPA Task Force Report to the Council on Environmental Quality, *Modernizing NEPA Implementation* 69 (Sept. 2003) [hereinafter, the "2003 NEPA Report"] ("CEQ supports use of mitigated FONSIs to reduce project impacts below the significance threshold."); Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years* 19 (Jan. 1997) ("[T]he EA today increasingly includes mitigation measures that reduce adverse effects below significant levels.") [hereinafter, the "CEQ Study," and available at http://clinton4.nara.gov/CEQ/reports/1994-95/rep_toc.html].

[10] In addition to lacking any support from CEQ itself, this statement is illogical on its face: A "mitigated FONSI" by definition involves using mitigation measures to reduce impacts, or in this case *potential* impacts, to insignificance. If there were no significant impacts or potential impacts to begin with, no mitigation would be necessary.

mitigation measures developed during an EA. Pet. 10. The 2003 NEPA Report recognizes CEQ's acknowledgment that "the approach discussed in Question 40 . . . is ***obsolete***."[11] The second is a short 1986 excerpt from the Federal Register in which CEQ addressed the manner in which incomplete or unavailable information is handled in an environmental impact statement. In this statement, CEQ indicated that "the weighing of risks and benefits for the particular federal proposal at hand is properly done after the completion of the entire NEPA process, and is reflected in the Record of Decision." Pet. 15.[12] This statement is inapposite because the Lead Agencies did not weigh the potential risks of the Longhorn project against its benefits.[13] Instead, using both quantitative and qualitative analyses, they determined that the project – as mitigated – would not significantly affect the quality of the human environment.

Furthermore, when the Lead Agencies approached CEQ about NEPA and its procedures, as contemplated by 40 C.F.R. § 1506.7, they were not asking CEQ to weigh the risks and benefits of the Longhorn project. Instead, after acknowledging the "enormous progress" that had been made as a result of the Longhorn Mitigation Plan in reducing the environmental risks associated with the

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[11] 2003 NEPA Report, *supra*, at 69 (emphasis supplied).

[12] *Citing* 51 Fed. Reg. 15,621 (April 25, 1986).

[13] The Petition itself makes this point by omission: Petitioners do not, nor could they, cite any support in the record for their proposition that the Lead Agencies based the FONSI on a determination that the project's future risks are "outweighed by the projected benefits of Longhorn's bringing gasoline to isolated markets." Pet. at 15.

pipeline, EPA and DOT sought CEQ's advice on how to proceed "given the novel and difficult issues raised by applying NEPA in this present context." App. 191a.[14] NEPA charges CEQ with the responsibility "to review and appraise the various programs and activities of the Federal Government ***in the light of the policy*** set forth in . . . this Act . . . , and to make recommendations to the President with respect thereto." 42 U.S.C. § 4344(3) (emphasis supplied). Pursuant to its statutory responsibility and consistent with its regulations, CEQ advised the Lead Agencies on September 7, 2000 that a FONSI was appropriate for the Longhorn project. App. 196a. Under the circumstances, this was entirely appropriate.

iv. There are no certain significant impacts from the Longhorn Pipeline

Unlike cases where a proposed project has unavoidable effects on the environment that need to be "mitigated" (*e.g.*, building a dam, siting a highway or excavating an

[14] Normal operation of the Longhorn project would not pose any significant environmental risk. Therefore, the issue became whether the probability of a release, in light of the possible consequences, elevated the potential environmental impact to a level of significance. DOT, which had experience in pipeline risk assessment (and which was designated the Lead Agency for the risk assessment analysis under the Settlement Stipulation) determined that it did not. EPA, which admittedly had no expertise in this area (and was not the Lead Agency for this part of the analysis), initially disagreed, but recognized that it was out of its area of expertise and asked CEQ for advice. It is a mystery how Petitioners can argue that this legitimate approach to resolving this important issue was improper. *See Stop The Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002) (approving Corps of Engineers' reliance on OPS analysis of pipeline safety given the "superior expertise" of OPS on that issue).

open pit mine), the Longhorn Project, operating under normal conditions, will have minimal adverse effects on the environment. R. 26:6450. Thus, the mitigation measures in the Longhorn EA focus initially upon eliminating the *chance* of an effect on the environment. But since the probability of a release from the pipeline cannot be reduced to absolute zero, the mitigation measures then focus on reducing the severity of any such release should it occur. Multiplying those two factors together, as required by NEPA, results in a conclusion of no significance from future "possible impacts."[15] *See City of New York v. United States Dep't of Transp.*, 715 F.2d 732, 745 (2d Cir. 1983).

v. Petitioners rely on a law review article that actually supports the Longhorn FONSI's validity

Petitioners claim that a 2002 Columbia law review article supports their negative view of mitigated FONSIs. (Pet.11).[16] To the contrary, the article opines that mitigated

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[15] Further, the courts have found that the speculative potential for impacts to occur is insufficient to demonstrate that the Lead Agencies acted arbitrarily or capriciously in issuing a FONSI. *E.g., Akiak*, 213 F.3d at 1146 (upholding FONSI in absence of a substantial question whether alleged negative impacts would *actually occur* and that they would be significant); *J.C. Morris Co. v. Slater*, 1998 WL 959658 (N.D. Tex. 1998) (FONSI was not arbitrary or capricious, and plaintiffs failed to demonstrate that a substantial threat of harm to environment was posed by project).

[16] Karkkainen, *supra*, at 908, 919 & nn.73, 74. Petitioners also cite this article for the proposition that "the number of EISs produced annually has declined steadily over the years despite growth in both the scale and scope of federal activity, while the number of EAs and FONSIs has soared." *Id.* at 934. This factual proposition is not found in

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FONSIs "should result in superior environmental outcomes"[17] and

> appear to be an ***environmental policy success***, not a failure. They achieve the substantive goal that has largely eluded the formal EIS process: effective integration of environmental concerns into project design and implementation by a government that is better informed and more reflective about its role as environmental steward than it would have been absent NEPA. . . . This Article embraces the centrality of the mitigated FONSI to the new NEPA that has emerged out of agency practice and the limitations of the EIS as an environmental management tool.[18]

C. CEQ's guidance to the Lead Agencies was proper

Petitioners' reliance on obsolete and inapplicable CEQ statements in the Federal Register to impugn the Longhorn FONSI ignores the fact that CEQ itself recommended the issuance of a FONSI for the Longhorn project. Attempting to overcome this obvious inconsistency, Petitioners argue that the Longhorn FONSI was a predetermined political decision funneled through CEQ and forced on the

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the record of this case, and Petitioners do not cite any primary source of authority for it.

[17] *Id.* at 908.

[18] *Id.* at 935, 971 (emphasis supplied). While the article does identify some generally applicable concerns with mitigated FONSIs (enforceability of mitigation measures, public involvement, lack of CEQ oversight), *id.* at 936-37, none of those concerns are implicated by the Longhorn FONSI. *See* App. 192a-196a.

Lead Agencies. In other words, Petitioners claim that the EA was not conducted in good faith. This claim fails on several levels.

First, when agency findings are challenged as arbitrary and capricious, the agencies' actions are judged in accordance with their stated reasons. *See, e.g., In re: Comptroller of the Currency*, 156 F.3d 1279 (D.C. Cir. 1998). Thus, the "actual subjective motivation of agency decisionmakers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior." *Id.* at 1279-80. Petitioners have presented no evidence that the Lead Agencies acted improperly or in bad faith when they conducted their "exceedingly thorough and comprehensive" EA for the Longhorn project. App. 12a. Accordingly, Petitioners' entire argument about political maneuverings and improper policy judgments is legally immaterial to this Court's consideration of the Petition.

Even assuming that Petitioners' political argument were legally relevant, the Lead Agencies had already taken a hard look at all relevant factors and made an initial decision not to prepare an EIS before seeking CEQ's advice on NEPA procedure. As recognized by the district court, the FONSI's "ultimate blessing by a political entity does not erase the careful study and designation of mitigation measures reflected in the EA." App. 39a. According to the Fifth Circuit, Petitioners' failure to establish any causal link between the political maneuverings they allege and the Lead Agencies' ultimate decision to issue a FONSI is "detrimental" to the argument that the EA was a foregone conclusion. App. 12a.

Given the length of time it took to complete this EA, the wide-ranging scope of the analysis conducted, the fact

that the Lead Agencies did not seek CEQ's advice on how to proceed until after their analysis was complete, the fact that the Lead Agencies had previously issued a preliminary FONSI, and the unprecedented measures agreed to by Longhorn to ensure the safety of this pipeline, Petitioners' argument that the process had a politically preordained result is far afield.

In addition to their political arguments, Petitioners also incongruously argue that environmental policy cannot be considered in a significance determination under the National Environmental ***Policy*** Act. To the contrary, even aside from its obvious consistency with NEPA's title and goals, environmental policy has been accepted by CEQ, this Court and Petitioners themselves as an appropriate factor in a NEPA review. CEQ's 25th Anniversary Study states: "Fortunately, CEQ survey results indicate that a number of agencies do use EAs to (1) integrate ***environmental values*** into agency decisions and (2) disclose information to affected parties" prior to issuing a FONSI.[19] Paragraph 7 of the Settlement Stipulation provides that the Lead Agencies would either issue a FONSI or a Notice of Intent to Prepare an EIS "in accordance with NEPA regulations and ***policy*** and this Stipulation." App. 161a. Finally, this Court has rejected similar claims in the rulemaking context.[20] Accordingly, even if

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[19] CEQ Study, *supra*, at 20 (emphasis supplied); *see also* Karkkainen, *supra*, at 935 (calling mitigated FONSIs "an environmental ***policy*** success") (emphasis supplied). The Lead Agencies expressly relied on CEQ's Study in the FONSI. App. 93a-94a.

[20] In *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, a pre-*Marsh* decision, this Court held that the "policy judgment" of the Nuclear Regulatory Commission in determining that the permanent

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CEQ did consider NEPA policy in advising the Lead Agencies, as NEPA expressly charges it to do, CEQ's actions were unquestionably valid.

Petitioners cannot have their cake and eat it too. They cannot rely on indirect snippets from obsolete CEQ guidance statements but ignore CEQ's direct application of NEPA's guiding principles to the Longhorn EA. Either CEQ is the authoritative voice in NEPA policy matters, as provided by the statute, or it is not. The Petition's inherent inconsistency in this regard highlights its lack of merit.

II. There is no Circuit split

Petitioners attempt to bootstrap their result-based criticisms of the Longhorn FONSI onto an alleged circuit conflict to justify granting this Petition. Pet. at 18-19. Because there is no such circuit conflict, this attempt must fail.

A. The Second and Fifth Circuits both use the arbitrary and capricious standard

Petitioners claim that "the arbitrary and capricious standard holding sway in the Fifth Circuit" conflicts with an allegedly different "close call" standard announced seven years ago by the Second Circuit in *National Audubon Soc'y v. Hoffman,* 132 F.3d 7, 13 (2d Cir. 1997). Pet. 18.[21] But Petitioners do not reveal that the Second

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storage of certain nuclear wastes would have no significant environmental impact was "within the bounds of rational decisionmaking." 462 U.S. 87, 105 (1983).

[21] Page 18 of the Petition claims that "[t]he lower courts have divided on the standard *agencies are to follow* in deciding whether to

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Circuit in *Hoffman* – just like the Fifth Circuit in this case – applied the APA's arbitrary and capricious standard to a FONSI determination. Petitioners also do not mention that the *Hoffman* court cited the Fifth Circuit's decision in *Save Our Ten Acres v. Kreger* as support for its holding. *Hoffman,* 132 F.3d at 13 (*citing Kreger,* 472 F.2d 463, 467 (5th Cir. 1973)).

B. This was not a "close call"

Even assuming for argument's sake that "close call" were a standard, there is no conflict because nothing in the opinions below indicates that the Longhorn FONSI was a close decision. In fact, the opposite is true. As observed by the Fifth Circuit:

> [I]n many ways, this EA is more akin to a full-blown EIS; it is unclear exactly what more the Lead Agencies could have done to evaluate the significance of the pipeline's impact. . . . Indeed, considering the extensive and comprehensive nature of the EA conducted here, it is unclear exactly what more process would involve.

App. 10a, 18a.

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stop at a FONSI or move to the EIS phase." (Emphasis supplied). However, the only alleged conflict identified by Petitioners is a claimed difference in judicial review standards between the Fifth and Second Circuits. The Petition does not identify any lower court division on NEPA standards for any agency's FONSI determination.

C. This is not an "important issue" that could frequently recur without this Court's intervention

Hoffman was decided seven years ago. In those seven years, no reported decision has relied upon Petitioners' allegedly conflicting "close call" standard to overturn a mitigated FONSI, despite the plethora of NEPA challenges lodged every year.[22] To the contrary, the arbitrary and capricious standard has been uniformly applied as required by the APA and *Marsh*. While results of the decisions applying the standard have, of course, varied depending on the facts of each case, not one decision required an EIS based on a perceived "close call."

III. The Fifth Circuit made the right decision

A. Petitioners' demands have been fully satisfied

When this lawsuit was originally filed, Petitioners demanded "to have the federal government perform a full-fledged review, as required by [NEPA], of the environmental consequences of [the Longhorn Project]." R. 1:000002. Petitioners later agreed, in a Settlement Stipulation approved by the district court, to a detailed Environmental Assessment ("EA") of the Longhorn Project in accordance with NEPA. App. 157a. After conducting the EA over a period of 20 months, the Lead Agencies issued

[22] In fact, only one lower court besides the Fifth Circuit in this case has ever even mentioned the *Hoffman* "close call" language, and that case upheld a FONSI under the arbitrary and capricious standard. *Atlantic State Legal Foundation, Inc. v. Browner,* 2000 WL 1234659 (S.D.N.Y. 2000).

the FONSI with mitigation commitments that the Lead Agencies determined were unprecedented in the industry. As recognized by the district court in its thorough Order of July 19, 2002, Petitioners now have everything they asked for in their Complaint and everything required by the Settlement Stipulation.

B. The Longhorn EA complies with NEPA

i. The "hard look" standard

NEPA guarantees only a process, not a particular result. *Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-28 (1980) (per curiam); *Robertson,* 490 U.S. at 352 (NEPA relies "on procedural mechanisms – as opposed to substantive, result-based standards. . . . "). NEPA and its implementing regulations direct federal agencies to take a "hard look" at the environmental consequences of their actions, *Robertson,* 490 U.S. at 350, and create a record that will inform the public that the agency has, in fact, considered those consequences. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,* 462 U.S. 87, 97 (1983). Because NEPA offers only procedural requirements, it "only prohibits uninformed – rather than unwise – agency action." *Robertson,* 490 U.S. at 351.

ii. The Longhorn EA was unquestionably a "hard look"

The exhaustive Longhorn EA is an unblinking "hard look" at the potential environmental impacts of the Longhorn

Pipeline.[23] The EA is over 2400 pages in length, contained in four volumes. It devotes 361 pages to consideration of possible impacts to water quality, 243 pages to public safety, 127 pages to protection of protected plant and animal species, 40 (in addition to the Longhorn Facility Response Plan) pages to emergency response planning, 106 pages to pipeline integrity, corrosion protection and leak detection, 101 pages to project alternatives, and 498 pages to mitigation. The EA incorporates reports from numerous outside experts specializing, *inter alia,* in pipeline operations and safety, identification and protection of endangered species, hydrology, geology, lake and stream modeling, probability and risk analysis, chemistry, and emergency response planning and implementation.

In preparing the Longhorn EA and FONSI, the Lead Agencies divided the Longhorn Pipeline into approximately 6,300 identifiable segments[24] and then used the

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[23] In contrast to the Longhorn EA, the EAs in those rare cases where courts have rejected an agency's decision to issue a FONSI clearly failed to take a "hard look" at a project's effect on the environment. For example, in *Foundation for North Am. Wild Sheep v. USDA,* the court rejected the Forest Service's preparation of an EA because, according to the court, the Service failed to address "certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS." 681 F.2d 1172, 1178 (9th Cir. 1982) (citations omitted). In a more recent case, the Ninth Circuit again rejected a Forest Service EA which insisted that salvage logging operation would not increase sedimentation, but failed to document the effects of logging and roadbuilding on sedimentation. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208 (9th Cir. 1998), *cert. denied,* 527 U.S. 1003 (1998). According to the court, "[t]he Forest Service's only attempt to measure sediment failed when its data collection box overloaded with sediment." *Id.* at 1213.

[24] The initial risk analysis performed in the Draft EA divided the pipeline into approximately 8,000 sections. However, as the Lead

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sophisticated risk assessment methodology described in *Pipeline Risk Management Manual, 2nd Edition* (Muhlbauer, 1996) to calculate the relative risks and probabilities of failure (together, the "Index Sum") for each segment along the entire Pipeline. App. 71a. The higher the Index Sum score for a pipeline segment, the lower the risk of a pipeline failure. The Lead Agencies then considered the consequences of a release of product from the Pipeline by determining which segments along the pipeline were located in areas (a) the most sensitive to a potential pipeline failure (the "hypersensitive" or Tier III areas), (b) very sensitive to a pipeline failure (the "sensitive" or Tier II areas), and (c) the remainder of the pipeline route (Tier I areas). App. 71a. The tiering classifications were based on the proximity of receptors such as ground water, surface water, watersheds, human population, threatened and endangered species and recreational facilities. App. 71a.

The Lead Agencies then required that all segments of the pipeline located in each Tier have specified minimum safety ratings (based upon Index Sums). No segment of the pipeline located in a Tier III area was permitted to have an Index Sum of less than 280 points, which equates to a level of safety equivalent to a new pipeline in a relatively risk-free environment. App. 72a; R. 26:6540a. No segment of the pipeline located in a Tier II area was permitted to have an Index Sum of less than 240 points, which equates to a level of safety equivalent to a pipeline operated by a

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Agencies continued to review and refine the risk analysis for the Longhorn Pipeline, the number of unknown variables that had to be taken into consideration was reduced which resulted in fewer (longer) segments of pipeline being evaluated.

diligent and prudent operator in a relatively risk-free environment. Finally, no segment of the pipeline located in a Tier I area was permitted to have an Index Sum of less than 200 points, which equates to a level of safety significantly higher than minimum DOT requirements. App. 72a; R. 26:6540 & 6540a.

If a segment did not meet the minimum safety standards set by the Lead Agencies, Longhorn was required to adopt mitigation measures that would result in the minimum Index Sum scores being achieved. App. 72a. In addition, to reduce the risk of environmental impact from a pipeline release to a level of insignificance, Longhorn was also required to adopt combinations of mitigation measures appropriate for each pipeline segment to minimize the damage that could occur in the unlikely event of a pipeline release.

To reach their decision, the Lead Agencies and their technical experts were required to evaluate the effectiveness of Longhorn's mitigation measures in reducing pipeline risks to a level of insignificance in terms of potential environmental and safety impacts. This evaluation required an analysis of scientific data relating to pipeline operations, pipeline safety and environmental impacts that was peculiarly within the expertise of the Lead Agencies and their technical experts.

The EA also goes beyond mere compliance with the requirements of the Settlement Stipulation by specifically responding to all concerns expressed by Plaintiffs and others during the public comment period. The EA was developed with input from more than 6000 public comments, generated through six public hearings and extensive consultation with the Plaintiffs, their employees, and

their hired consultants. App. 73a. All public comments were summarized and addressed in Volume 4 of the EA.

After taking the requisite "hard look" at the environmental consequences of the project, the Lead Agencies rationally concluded that the Longhorn project – with its extensive slate of mitigation measures – would not have significant environmental impacts. The EA creates a record that informs the public that the Lead Agencies have, in fact, considered the potential for and consequences of those environmental impacts. The FONSI resulting from the EA was not arbitrary or capricious, an abuse of discretion or contrary to law.

iii. Petitioners' improper probability aggregations do not impact the validity of the Longhorn FONSI

The Petition is peppered with the claim that the Longhorn FONSI was inappropriate because there is a combined 15.3% probability that sometime during the next fifty years there will be an adverse environmental impact affecting a stream, a wetland or drinking water, or there will be an injury or a death. Pet. at 7-8, 16 & 19. This 15.3% number is generated by aggregating five low percentages of something happening sometime during the next fifty years, and including within those aggregated percentages emotive risks such as death or injury (which are of minute probability).[25] By manipulating percentages

[25] *See* App. 84a-88a for the FONSI's analysis of these residual risks.

in this way, Petitioners hope to convince the Court that this project is imminently dangerous.

A review of the actual percentages relied upon by Petitioners demonstrates the fallacy of their arguments:

A. More than half of this claimed 15.3% probability (8%) is attributable to the possibility of a recreational stream being contaminated at some point in time over the next fifty years. R. 26:6571, 6571a, 7068a. Even that contamination would more likely than not result from a spill of less than 50 barrels. R. 26:6571a, n.3. In this regard, it is important to note that a significant part of Longhorn's mitigation plan is aimed at quickly detecting, containing and promptly remediating any such spill.

B. Although there is a 2% chance of injury to a person from a pipeline accident over a 50 year time period, that compares to a 50% chance of injury to that same person in a car accident over the same time period (that is, it is 25 times more likely over the next fifty years for a person to be injured in a car accident than to be injured by this pipeline). R. 26:6436 & 6436a.

C. Although there is a .5% (*i.e.,* 1 out of 200) chance of a death resulting from a pipeline accident in the same fifty years, there is a greater probability (.8%, or 1.6 out of 200) of that same person dying in an auto accident over the same time period. R. 26:6436 & 6436a.

From a different perspective, based upon the probabilities set out in the EA, there is a 99.9% probability that all drinking water sources will be completely protected from any contamination by the pipeline over the 50 year life of the project and a 95% probability that all

wetlands will be completely protected from any contamination during the pipeline's 50 year life.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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No. 03-1428

In the Supreme Court of the United States

CITY OF AUSTIN, ET AL., PETITIONERS

v.

NORMAN MINETA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, requires federal agencies to prepare an environmental impact statement even if an extensive environmental analysis reveals that adopted mitigation measures will result in the project not having a significant effect on the environment.

2. Whether the court of appeals applied the appropriate legal standard in upholding the federal agencies' determination that adopted mitigation measures for a pipeline project rendered possible environmental risks insignificant.

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In the Supreme Court of the United States

No. 03-1428

CITY OF AUSTIN, ET AL., PETITIONERS

v.

NORMAN MINETA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 352 F.3d 235. The order of the district court (Pet. App. 20a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2003. A petition for rehearing was denied on January 12, 2004 (Pet. App. 97a-98a). The petition for a writ of certiorari was filed on April 12, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge the decision of the Department of Transportation Office of Pipeline Safety and the

Environmental Protection Agency (together, the Lead Agencies) not to prepare an environmental impact statement for the Longhorn pipeline project proposed by the Longhorn Partners Pipeline, L.P. (Longhorn). The district court granted the Lead Agencies' motion for summary judgment and dismissed the case. Pet. App. 20a-66a. The court of appeals affirmed. *Id.* at 1a-19a.

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, directs federal agencies to prepare a detailed statement, known as an environmental impact statement (EIS), when undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). See *Department of Transp.* v. *Public Citizen*, No. 03-358 (June 7, 2004), slip op. 1. NEPA is a procedural statute intended to promote environmentally informed decision-making by federal agencies. See, *e.g.*, *ibid.*; *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). NEPA injects environmental considerations into the federal agency's decision-making process and informs the public that the agency has considered environmental concerns in the process. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 (1979).

NEPA does not mandate "particular results," but instead "simply prescribes the necessary process" to ensure that federal agencies will take a "hard look" at environmental consequences. *Methow Valley*, 490 U.S. at 350; see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). NEPA does not require agencies to "elevate environmental concerns over other appropriate considera-

tions." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980).

The Council on Environmental Quality's (CEQ's) regulations implementing NEPA provide a procedure for determining whether an EIS is necessary for particular federal actions. Those regulations provide for the preparation of "environmental assessments" (EAs), which are usually "concise" documents that "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact [(FONSI)]." 40 C.F.R. 1508.9(a)(1). An EIS is not required if the agency concludes in an EA and FONSI that the proposed action will not have a significant effect on the environment. *Ibid.*; 40 C.F.R. 1508.13.

Under the CEQ regulations, a FONSI must "briefly present[] the reasons why an action * * * will not have a significant effect on the human environment." 40 C.F.R. 1508.13. An agency may conclude, however, that mitigation measures will reduce the project's potential impacts so that they are no longer significant, and the agency may condition its decision not to prepare a full EIS on adoption of mitigation measures. *City of Auburn* v. *United States*, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); see *Audubon Soc'y* v. *Dailey*, 977 F.2d 428, 435-436 (8th Cir. 1992); *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58, 62 (4th Cir. 1991), cert. denied, 502 U.S. 1092 (1992); *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d 1569, 1575 (11th Cir. 1988); *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982). In such instances, an agency issues a "mitigated" FONSI explaining that potentially significant effects of a project have been avoided by mitigation measures reducing those effects to a level of insignificance.

2. In 1997, Longhorn purchased from the Exxon Pipeline Company a crude oil pipeline running from Crane, Texas, to Houston, Texas. Pet. App. 5a. Longhorn purchased the pipeline to transport gasoline and other petroleum products from Gulf Coast refineries to El Paso, Texas. To accomplish that goal, Longhorn proposed to extend the pre-existing pipeline to El Paso. *Id.* at 69a. The entire pipeline operation, as envisioned by Longhorn, is a 731-mile system that would eventually transport 225,000 barrels per day of refined petroleum product from Houston to El Paso and Odessa. *Id.* at 22a.

3. Petitioners sued to compel the federal government, which has regulatory responsibilities respecting pipeline safety, to perform a full environmental review of the impacts of the Longhorn pipeline operation. The district court entered a preliminary injunction against the United States and directed the Department of Transportation "and/or" the Environmental Protection Agency (EPA) to comply with NEPA by preparing an EIS.[1] Pet. App. 140a. Petitioners and the Lead

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[1] The Department of Transportation has statutory responsibility for ensuring the safe transportation of hazardous liquids by pipeline. Pursuant to 49 U.S.C. 60101 *et seq.*, the Department of Transportation has promulgated safety standards concerning pipeline construction, operation, and maintenance. See 49 C.F.R. Pts. 40, 190, 195, 199. The Department of Transportation's Office of Pipeline Safety enforces those regulations and inspects pipelines to monitor compliance with its safety standards. Under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, the Office of Pipeline Safety has responsibility for review and approval of response plans for cleanup in case of a spill. See 33 U.S.C. 1231, 1321; 49 C.F.R. Pt. 194. Although EPA has no direct regulatory responsibilities respecting pipeline safety, it volunteered to take a joint lead role in the negotiated environmental review process in order to lend its

Agencies then negotiated a settlement agreement, entered as a court order on March 1, 1999, under which the Lead Agencies undertook an extensive environmental analysis of the Longhorn project under NEPA. *Id.* at 156a-184a, 185a-188a. The Lead Agencies agreed to consider any reasonable mitigation measures that would prevent the project from significantly affecting the environment, including conditioning the issuance of a FONSI upon the implementation of such measures. *Id.* at 161a (para. 8).

After conducting an extensive review and considering public comments, the two Lead Agencies—the Office of Pipeline Safety and EPA—sought CEQ's advice over whether to issue a FONSI. CEQ, the agency that provides legal and policy direction for implementing NEPA, reviewed an internal draft of the Final EA and the mitigation plan so that CEQ could provide advice on the proper application of NEPA to the Longhorn project. Pet. App. 77a. After noting that the mitigation plan will "reduce the probability of a spill to a minimum and that the threat to the environment is insignificant based on the extensive mitigation measures being implemented," CEQ agreed that a mitigated FONSI was appropriate. *Id.* at 194a. CEQ summed up its analysis by concluding that "virtually nothing could be gained in terms of useful environmental information or analysis by 'redoing' this extensive document as an EIS, other than sheer delay." *Id.* at 196a.

After more than a year-and-a-half of environmental review of the proposed action, including substantial public participation, the Lead Agencies signed a

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experience and expertise to the environmental review of the Longhorn pipeline project.

FONSI based on a detailed EA. The analysis in the EA provided the basis for the conclusion that normal operation of the pipeline would itself have no significant impact on the environment. Rather, any potentially significant impacts associated with the pipeline would relate primarily to the possibility of a leak or spill that could have environmental or public safety consequences. As noted in the FONSI, the "EA in this matter is far more than a generic look" at the environmental impacts of a pipeline. Pet. App. 79a. Rather, the analysis involved a level of "scientific rigor and conservatism" that is "unprecedented in NEPA review" of pipeline projects. *Id.* at 95a.

To address the possibility of such potentially significant impacts and to increase leak detection and response capabilities, the project incorporated 40 mitigation measures ranging from pipe repair or replacement to a state-of-the-art leak detection system in the area where the pipe crosses the environmentally sensitive Edwards Aquifer. Pet. App. 79a-84a. The mitigation plan also required rigorous in-line inspections after startup, to be conducted by an independent third party approved by the Office of Pipeline Safety and as dictated by Longhorn's Operational Reliability Assessment. *Id.* at 80a. Those mitigation measures are legally binding on Longhorn and will be enforced by the Office of Pipeline Safety. *Id.* at 42a.

The Lead Agencies determined that the mitigation measures would lead to a 20-fold reduction in the frequency and probability of spills, thereby reducing the probability of potential impacts from the proposed project to a level of insignificance. Pet. App. 40a. As stated in the FONSI, the risks

> are not only minimal in an absolute sense, but are far lower than risks normally associated with operation of similar pipelines and far lower than similar risks much of the same environment faced over the fifty years [Exxon Pipeline Company] operated the Houston to Crane segment. They add no large incremental risk to the overall risks of pipeline failure along most of the pipeline's route and Longhorn's mitigation measures may even substantially reduce some pre-existing risks.

Id. at 91a-92a.

The Lead Agencies based their determination on analyses of the probability of failure for about 8000 individual pipeline segments, the nature of harm a spill or leak might cause to each area the pipeline traversed, and alternatives for reducing both the probability and consequences of failure. They also performed statistical analyses to estimate pre-mitigation and post-mitigation risk, concluding that only two or three product spills would likely occur over the 50-year life of the mitigated pipeline and that the effects of such spills would not result in significant impacts. Pet. App. 85a. Their evaluation included an assessment of the risk of surface water contamination, *id.* at 85a-86a, drinking water contamination, *id.* at 86a-87a, the contamination of an unusually sensitive aquifer (Barton Springs), *id.* at 87a-88a, death or injury, *id.* at 88a-89a, and overall area risk, *id.* at 89a-90a.[2]

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[2] The petition inaccurately claims that the Lead Agencies concluded there was a 15% to 20% risk of environmental damage from the pipeline. Pet. 7-8, 16, 19. Petitioners have apparently arrived at that figure by improperly aggregating the Lead Agencies' estimates of residual risk to overlapping types of environmental and social amenities.

3. On cross-motions for summary judgment, the district court upheld the agency's NEPA analysis and FONSI. Among other matters, the court recognized that the Lead Agencies' consultation with CEQ did not render the FONSI decision arbitrary and capricious. Pet. App. 39a. Instead, the court held that the Lead Agencies properly took a hard look at the relevant factors before turning to CEQ for guidance. *Ibid.* The court also upheld the Lead Agencies' issuance of a mitigated FONSI, recognizing that a "mitigated FONSI avoids the expense and delay of an EIS, giving the project applicant an incentive to volunteer mitigation measures beyond what agencies could force it to adopt." *Id.* at 40a.

4. The court of appeals affirmed. Pet. App. 1a-19a. The court held that the Lead Agencies had not acted in bad faith in consulting with the CEQ. *Id.* at 12a-13a. The court also rejected petitioners' claim that the Lead Agencies had made an impermissible policy-based decision by determining that the mitigation measures rendered insignificant any risks associated with the Longhorn project, stating that "determining whether significance exists inherently involves some sort of a subjective judgment call." *Id.* at 17a n.5.

ARGUMENT

The court of appeals correctly concluded that NEPA does not require the Lead Agencies to prepare an EIS, above and beyond the extensive environmental analysis that those agencies have already conducted, to evaluate the environmental impacts of the Longhorn pipeline project. The court of appeals' affirmance of the district court's fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Review by this Court is accordingly not warranted.

1. The lower court correctly held that the Lead Agencies fulfilled the requirements of NEPA by determining, after an extensive environmental analysis, that an EIS was unnecessary for the Longhorn pipeline project. As the D.C. Circuit stated in *Cabinet Mountains*:

> [A]n EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required.

685 F.2d at 682 (internal quotation marks and citations omitted). The Lead Agencies properly concluded that the enforceable mitigation measures prescribed in this case would avoid any significant impacts that could create the need for an EIS. See 42 U.S.C. 4332(2)(C).

Every court of appeals that has addressed the issue has held that the adoption of mitigation measures may eliminate the need for an EIS. *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992) (stating that mitigation may obviate the need for an EIS even where the effectiveness of mitigation is uncertain); *Audubon Soc'y* v. *Dailey*, 977 F.2d 428, 435-436 (8th Cir. 1992) ("An agency may certainly base its decision of 'no significant impact' on mitigating measures to be undertaken by a third party."); *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58, 62 (4th Cir. 1991) ("If a mitigation condition eliminates all significant environmental effects, no EIS is required."), cert. denied, 502 U.S. 1092 (1992); *C.A.R.E. Now, Inc.* v. *FAA*, 844 F.2d

1569, 1574 (11th Cir. 1988) (stating that "[w]hen mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of significant impacts is not reached so no EIS is required"); *Cabinet Mountains*, 685 F.2d at 683 (explaining that courts should uphold an agency's determination that the mitigated project does not require an EIS unless that determination is arbitrary or capricious).

Petitioners are mistaken in asserting (Pet. 12-17) that an agency may not bring its scientific expertise to bear in evaluating risk as part of the determination of significance in an EA and, consequently, in determining whether mitigation measures will reduce that risk below a level of significance. As the Second Circuit recognized in *City of New York*, agencies have "latitude in determining whether the risk is sufficient to require preparation of an EIS." *City of New York* v. *United States Dep't of Transp.*, 715 F.2d 732, 746 n.14 (1983), cert. denied, 465 U.S. 1055 (1984). That latitude is necessary because risk assessment is a key consideration in determining the significance of possible environmental impacts, and the "concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence." *Id.* at 738. The court of appeals in this case correctly deferred to the Lead Agencies' determination that the Longhorn project presents little risk of accident that could significantly affect the environment. That determination is within the agencies' expertise. Pet. App. 17a-18a n.5; see *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989).[3]

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[3] Contrary to petitioners' suggestions (Pet. 14-15, 19), CEQ properly participated in this case. The Lead Agencies properly sought CEQ's advice on NEPA compliance because CEQ, among

2. Petitioners are mistaken in contending (Pet. 18-20) that the court of appeals' decision conflicts with *National Audubon Society* v. *Hoffman*, 132 F.3d 7 (2d Cir. 1997). In that case, the Second Circuit stated that an EIS should be prepared "[w]hen the determination that a significant impact will or not result from the proposed action is a close call." *Id.* at 13. Nevertheless, the court ultimately assessed the agency's compliance with NEPA under the same "arbitrary and capricious" standard that the court of appeals applied in this case. Compare *id.* at 18, with Pet. App. 17a & n.4. See *Department of Transp.* v. *Public Citizen*, No. 03-358 (June 7, 2004), slip op. 9. The Second Circuit's decision in *National Audubon Society* and the court of appeals' decision here are therefore fully consistent in applying that standard.[4]

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other duties, is responsible for interpreting NEPA, issuing regulations, providing interagency coordination, and resolving interagency conflicts involving NEPA. See *Department of Transp.* v. *Public Citizen*, No. 03-358 (June 7, 2004), slip op. 2-3; 42 U.S.C. 4344; Exec. Order No. 11,514, 3 C.F.R. 531 (1970 comp.), as amended by Exec. Order No. 11,991, 3 C.F.R. 123 (1978 comp.); cf. *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1261 (D.C. Cir. 1980) (describing CEQ's role in interagency coordination).

[4] Indeed, to the extent that the court of appeals itself suggested any tension between its decision and the Second Circuit's decision in *National Audubon Society*, that suggestion is dictum. The court of appeals questioned the Second Circuit's statement that an EIS would be required if the significance of a project's impact is a "close call," Pet. App. 17a n.4, but the court of appeals never determined that the assessment of the Longhorn pipeline itself presented such a "close call." Therefore, even if the court of appeals had squarely rejected the Second Circuit's statement, that rejection would be a nonbinding observation that would provide no basis for this Court's review.

Although the Second Circuit in *National Audubon Society* ruled against the government, the difference between the ultimate outcomes of that case and this one turns on their facts and does not present any issue warranting this Court's review. In *National Audubon Society*, the Second Circuit concluded that the Forest Service had acted arbitrarily and capriciously in deciding not to prepare an EIS for a logging operation. The court of appeals based that holding on its review of the Forest Service's analysis of the applied mitigation measures. 132 F.3d at 16-17. The Second Circuit pointed out that the Forest Service itself had acknowledged that there was a problem with unauthorized use by all-terrain vehicles and that their use would likely increase with the project. *Id.* at 16. Although the Forest Service proposed mitigation measures to counter the impact of the unauthorized traffic, the Service "conducted no study of [the mitigation measure's] likely effects" and "proposed no monitoring to determine how effective the proposed mitigation would be." *Id.* at 17.

In contrast, the mitigation measures in this case are both far better understood and far more effective than those at issue in *National Audubon Society*. The Lead Agencies studied the Longhorn mitigation measures extensively through the use of an enhanced version of the relative risk model commonly used in the pipeline industry. Pet. App. 71a-72a. The adopted mitigation measures include an operation reliability assessment that Longhorn will perform at least yearly to provide a technical assessment of the effectiveness of the mitigation measures. *Id.* at 82a. The difference in the outcome in *National Audubon Society* and this case accordingly reflects differences in the character of the

projects and the selected mitigation measures, which present no matter warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2004

(4)

No. 03-1428

In The
Supreme Court of the United States

Supreme Court, U.S.
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CITY OF AUSTIN, MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, and DAVID ROBERTSON,

Petitioners,

v.

NORMAN MINETA, Secretary of Transportation, MIKE LEAVITT, Administrator of Environmental Protection Agency, LES BROWNLEE, Acting Secretary of the Army, THE UNITED STATES, and LONGHORN PARTNERS PIPELINE, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO FEDERAL AND LONGHORN PARTNERS PIPELINE BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEFS IN OPPOSITION

The City of Austin ("City"), Marian Collins, the Barton Springs-Edwards Aquifer Conservation District, and Professor David Robertson (collectively, the "Collins petitioners") reply to the Brief for the Federal Respondents in Opposition ("Federal Opp.") and the Brief of Respondent Longhorn Partners Pipeline, L.P., in Opposition to Petition for a Writ of Certiorari ("Longhorn Opp.").

The elaborate lengths to which the government has gone to avoid conducting an EIS for the Longhorn Pipeline project exemplifies the problems noted by Justice Breyer when he wrote for the First Circuit in one of the leading NEPA decisions, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). After noting the practical wisdom of agencies' simply going ahead and performing an EIS, instead of working so hard and at such length to stop at an EA,[1] Now-Justice Breyer's opinion explains that "an EA and an EIS serve very different purposes." 769 F.2d at 875. An EA's job is to "identify" potential impacts, not to "balance" and "weigh" the impacts against other project objectives. The EIS is the decision tool for the latter job. *Id.*

In recent years, NEPA practice in the federal bureaucracy has evolved to the point that it now lumps the purposes of two different NEPA phases – *identification* of impacts for the EA phase; *balancing* of impacts with other objectives for the EIS phase – into a single phase, through the NEPA hybrid known as a mitigated FONSI. The Court never has provided guidance on the standards that should

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[1] This wisdom is echoed in a later article by a former CEQ general counsel: Discussing an agency practice of performing EAs that have the look and feel of EISs, she criticizes as "unfortunate" the rationale that doing so "avoid[s] as much public involvement as an EIS would stimulate." D. Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENV. L. REP. 10060, 10063 (1989). She concludes that, instead of "being prepared to turn the EA into an EIS rapidly" if directed by a court, agency officials "would be far better advised to simply proceed with circulation of the document as an EIS." *Id.*

govern use of this now commonplace aspect of NEPA administration. And, the CEQ itself notes its continuing uncertainty about how to treat the addition of mitigation measures in the EA phase to bring the level of expected impacts below the significance level. *See* NEPA's Forty Most Asked Questions, at http://ceq.eh.doe.gov/nepa/regs/40/30-40.HTM#39.

I. The legality of mitigated FONSIs is *not* at issue in this case; instead, the issue is what standards govern agency use of mitigated FONSIs and whether a mitigated FONSI can be used as a policy-making device that evades NEPA's procedural safeguards.

Both the Federal Respondents and Longhorn fundamentally mischaracterize the central issue presented to the Court. Contrary to the misleading reformulations of questions presented,[2] the validity of mitigated FONSIs *vel non* is not challenged. That could hardly be done, since the first-phase settlement agreement contemplated the *possibility* of a mitigated FONSI for the Longhorn project.[3]

Instead, the questions are what standards govern the use of mitigated FONSIs and does NEPA permit agencies to shift their policy determinations on projects from the statutorily-designated locus at the end of the EIS phase to the bureaucratically-devised mitigated FONSI phase.

Mitigated FONSIs are not grounded in either NEPA's text or CEQ's binding NEPA regulation but, instead, arise

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[2] *See* Federal Opp. at (I) (first reformulated question) *and* Longhorn Opp. (unnumbered opening page, second reformulated question).

[3] Longhorn, however, has no basis whatever for positing that the parties contemplated a mitigated FONSI as a "likely outcome" of the process. *See* Longhorn Opp. at 4. That Longhorn was made privy to the government's hidden agenda to avoid an EIS is a far cry from the City and the Collins petitioners being aware or supportive of the plan. They were not.

from bureaucratic experience and practice.[4] The significant legal problem they create is not in their existence, however tenuous, as bureaucratic devices; instead, it is in the practical administration of applying the mitigated FONSI concept to actual projects subject to NEPA inquiry. At this critical level of practical NEPA administration, the use of mitigated FONSIs is virtually standardless and subject to manipulation to advance hidden policy objectives. That is why this case raises such critical issues for enforcement of a cornerstone of federal environmental law.

Operating in a legal vacuum, with no written law, regulation, or policy guidance, the federal agencies have set themselves adrift without written legal guidance and are increasingly using the mitigated FONSI concept as a way to pack environmental policy choices into NEPA's EA phase. Whether this transformation of NEPA practices is good policy is not the issue and is not addressed here. The point is that it has resulted in rapidly increasing curtailment of the use of EISs, which in turn means that the main procedural right afforded NEPA plaintiffs (who have *only* procedural rights) is disappearing without the courts even noticing – and without establishment of clear standards by the courts.

That the standards guiding agencies in their use of mitigated FONSIs are muddled and uncertain is thrown into relief by the various arguments in the opposition briefs of the government and Longhorn. The government emphasizes the Longhorn FONSI's conclusion that the

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[4] The leading NEPA treatise correctly explains that the CEQ regulations do not address the role of mitigation when agencies choose not to prepare EISs. Daniel R. Mandelker, NEPA LAW AND LITIGATION, § 8.08[10] (2d ed. 1995). Neither the Federal Respondents nor Longhorn makes any effort to refute this point. The government cites the standard CEQ regulations for the basic proposition of what a FONSI is, but then, in the next sentence, when it turns to what a *mitigated* FONSI is, cites only case law – and non-Supreme Court case law at that. Federal Opp. at 3.

Longhorn mitigation measures would make it safer than the old pipeline and "similar pipelines," Federal Opp. at 7, while ignoring the fact that NEPA does not ask whether a project will be comparatively better than it would otherwise have been but, instead, what its impacts will be and whether they may be "significant." A project that may cause significant environmental impacts requires an EIS, regardless of whether it is going to be a good or worthwhile project.

Longhorn's argument suggests yet another, and different, factor supporting a mitigated FONSI: the actual intent of those invoking NEPA's procedural protections. *See* Longhorn Opp. at 2 & n.1 (deriding "result-oriented" nature of NEPA challengers).[5] Yet, subjective motivation – of either NEPA plaintiffs or federal agencies – should play no role in evaluating the *bona fides* of a mitigated FONSI determination.

The government touts the benefits of mitigated FONSIs in avoiding expense and delay, Federal Opp. at 8, but that cannot be the standard for validating mitigated FONSIs. Otherwise, the NEPA process would *always* stop at the FONSI stage because it is always cheaper and faster to stop and not perform an EIS.

Both the government and Longhorn attack the aggregation of environmental impacts[6] the government itself

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[5] Longhorn, though, wants this kind of subjective inquiry to be only a one-way street. While repeatedly impugning the motives of the City and the Collins petitioners, Longhorn vehemently rejects the propriety of any inquiry into the subjective motivations of the federal agencies. Longhorn Opp. at 14. The City and the Collins petitioners have gone into the facts surrounding the federal agencies' masked pre-determination to avoid an EIS, not in order to show bad faith, but instead to highlight the fact that the agencies were determined to cram a policy-driven decision into the NEPA product (the FONSI) that is supposed to be fact-driven.

[6] Statistically correct aggregation of the government's own estimated probabilities of environmental harm results in there being an 18.3% probability of meaningful environmental harm from the pipeline's operation, even after mitigation measures are added in. *See* Pet. for Cert. at 7-8 & n.8.

concluded were probable results of operation of the mitigated version of the pipeline. Federal Opp. at 7 n.2; Longhorn Opp. at 23-24. Since neither offers even a modicum of technical support for its statements, and since the aggregation conforms to accepted statistical techniques outlined in the administrative record, the opposition's arguments can only be interpreted as opposition either to the very concept of taking *cumulative* impact into account at the mitigated FONSI stage or to the proposition that an 18.3% chance of predicted environmental harm does not equate to "significance."[7] But cumulation of harms is required at every stage of NEPA, including the mitigated FONSI stage,[8] and an 18.3% chance of harm, by any objective standard, surely must be "significant" under NEPA, even at the mitigated FONSI stage.

Finally, both the government and Longhorn exhibit confusion over the role of policy-making at the mitigated FONSI stage by confusing the role played by CEQ in the NEPA process in general and the mitigated FONSI stage in particular. In response to the argument that CEQ's stepping into the EA process to terminate the process means that the mitigated FONSI was policy-driven

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[7] The government defends the agencies' "subjective judgment call" on the significance of these risks. Federal Opp. at 8. Yet, it never explains why this subjective call is anything other than a policy determination. The closest it comes is its citation of *City of New York v. United States Department of Transportation*, 715 F.2d 732 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984), for the proposition that agencies have wide latitude in making significance determinations. The probabilities of adverse environmental impact involved in the NEPA decision in *City of New York* were infinitesimal compared to the ones involved in the Longhorn pipeline scenario. One chance in several million of harm is much more easily categorized as insignificant than nearly a 1 in 5 chance (the case here).

[8] *See, e.g., Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1076 (9th Cir. 2002) ("adequate consideration of cumulative effects requires that EAs address them fully," quoting 1997 CEQ publication).

instead of fact-driven, Longhorn plaintively complains that surely it must be conceded that CEQ is either the voice in NEPA "policy matters" or it is not. Longhorn Opp. at 16. But that makes the very point urged here: what CEQ forced into the square hole of the EA/FONSI phase was the round peg of a policy decision that belongs in the EIS/ROD phase of the NEPA process. Longhorn's argument is coherent only if it is assumed that mitigated FONSIs somehow change the rule and permit policy choices to be made in a truncated NEPA process that avoids EISs altogether. And, if that is to be the rule, then it should not be adopted through subterranean bureaucratic efforts but, instead, only after this Court, Congress, or CEQ through formal regulation has spoken on whether NEPA law is to be so transformed.

The government similarly has a curious defense of CEQ's intervention to pretermit the NEPA process. *See* Federal Opp. at 10-11 n.3. It cites a series of cases, regulations, and executive orders about the propriety of what CEQ did here. Yet, on examination, not a single one of the cited authorities addresses intervention to force a FONSI (mitigated or not) on a single-project basis.[9] They speak only generally of the central policy role played by CEQ, principally through its promulgation of the regulations broadly governing the NEPA process.

Thus, the arguments of the government and Longhorn reflect that, underneath the rote recitation of "arbitrary and capricious" as the standard for mitigated FONSIs, there lurks either confusion about what standards apply to evaluation of the special creature called mitigated FONSIs or, more worrisome, an assumption that the only standards that apply are *ad hoc* ones chosen by the agencies on

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[9] CEQ's NEPA regulations addressing federal agency invocation of CEQ intervention do not address the intervention situation in this case. *See* 40 C.F.R. §§ 1504.1-1504.3.

a project-by-project basis, without any acknowledgement of written guidance in law and regulation.

In either event, federal agency implementation of NEPA in the mitigated FONSI context is in a legally rudderless state. The Court has never provided any guidance on the standards for when mitigated FONSIs are legally acceptable. They now have become the principal device for NEPA decisionmaking in the government. This case squarely presents the issue of what standards are to govern their use, and the Court should use this opportunity to clarify the NEPA process on this important matter.

II. The standards for mitigated FONSIs that have been articulated by the lower appellate courts vary widely, contrary to their characterization by the government and Longhorn.

The government cites a long string of circuit court decisions upholding mitigated FONSIs under the arbitrary and capricious standard, suggesting that there is uniformity in the courts below and, thus, no need for the resolution of circuit conflict or confusion. Federal Opp. at 9-10; *see also id.* at 11 & n.4 (arguing that *National Audubon Society v. Hoffman*, 132 F.3d 7 (2nd Cir. 1997), is not in conflict with Fifth Circuit decision in this case). Longhorn argues that the standard for review of mitigated FONSIs has been "uniformly applied." Longhorn Opp. at 18. The reality is to the contrary. *See* NEPA's Forty Most Asked Questions, at http://ceq.eh.doe.gov/nepa/regs/40/30-40.HTM#39 (noting that "[c]ourts have disagreed with CEQ's position in Question 40").

The circuit court decisions that the Federal Respondents and Longhorn rely upon – aside from ritual invocation of the arbitrary and capricious standard – reflect, in fact, a wide array of standards for evaluating the legality under NEPA of a government agency decision to stop at a mitigated FONSI. The District of Columbia Circuit, in one of the most frequently cited of the mitigated FONSI cases,

concluded that a mitigated FONSI is acceptable if the mitigation "*completely* compensate[s] for *any possible* environmental impact." *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (emphasis added). The Fourth Circuit permits agencies to stop at mitigated FONSIs if the mitigation "eliminates *all* significant environmental effects[.]" *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 62 (4th Cir. 1991) (emphasis added), *cert. denied*, 502 U.S. 1092 (1992). In a contrasting standard expressly acknowledged by the Fifth Circuit, the Second Circuit held that when the question of whether the mitigation measures will eliminate any significant impact is a "close call," the government cannot stop at a mitigated FONSI but must proceed to an EIS. *National Audubon Society*, 132 F.3d at 13. The Eighth Circuit upheld a district court's rejection of a mitigated FONSI, requiring that, not only must the government give the requisite "hard look," but then must not "ignore what it saw." *Audubon Society v. Dailey*, 977 F.2d 428, 62 (8th Cir. 1992). The Ninth Circuit requires that the analysis of mitigated FONSIs distinguish between mitigation measures whose efficacy was attacked during the public comment period and those that were not. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992).[10]

In the circumstances of this case, the Fifth Circuit's express rejection of the Second Circuit's "close call" standard for mitigated FONSIs creates a plain conflict.[11]

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[10] The government also cites an Eleventh Circuit case, *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569 (11th Cir. 1988), in support of its argument that the standard for mitigated FONSIs is well-settled. Federal Opp. at 9. That case upheld a mitigated FONSI, but discussed only the role of "alternatives" analysis, not how mitigation measures might come into play to avoid the necessity of an EIS. *See* 844 F.2d at 1574.

[11] The government argues that the Fifth Circuit's observation that its decision conflicted with the Second Circuit's standard is dictum because the Fifth Circuit never determined that this case, in fact, presents a close call. Federal Opp. at 11 n.4. That is a fatuous argument. It assumes either that the Fifth Circuit had to have implicitly

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Moreover, the reality is that the conflict is not simply with the formulation of the Second Circuit's standard but also with the District of Columbia's (which requires complete compensation for any possible impact) and probably the Fourth Circuit's as well (which requires elimination of "all" significant impacts).

Whatever may be the conclusion about whether a mitigated FONSI was appropriate here, it cannot be seriously argued that this case does not present a close call on the question of significance. The two lead agencies themselves publicly split on this question after two years of study. They also acknowledged the uniqueness and importance of the dispute and the NEPA issues it presented. Even after CEQ effectively forced them to agree, their joint FONSI still reflects an *18.3% risk* of harmful environmental impacts. They negotiated at length with Longhorn, behind closed doors, for more than a year, going through twenty-one iterations of a mitigation plan in an effort to avoid an EIS.

It is plain that, had this case arisen in the Second Circuit, the "close call" standard that is applied there, but not in the Fifth Circuit, would have resulted in invalidation of the mitigated FONSI. The Court should take this case to determine what standard the circuits must use to evaluate mitigated FONSIs. The current reality is that there is not a settled and determinable standard for evaluating mitigated FONSIs that project applicants, project opponents, federal agencies, or the lower courts can use in this important area of the law.

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concluded that this case did not present a close call or that, as a factual matter, this case does not present a close call. There is no basis for assuming the Fifth Circuit implicitly decided this case does not present a close call, and the facts of this case, as detailed in the text of this response as well as in the certiorari petition, demonstrate that, at a very minimum, it is a very close call indeed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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